CLERK'S COPY.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 273.

DAVID KAWANANAKOA, JONAH KALANIANAOLE, ABIGAIL W. KAWANANAKOA, AND ELIZABETH K. KALANIANAOLE, APPELLANTS,

vs.

ELLEN ALBERTINA POLYBLANK, OTHERWISE KNOWN AS SISTER ALBERTINA, TRUSTEE FOR STELLA KEOMAILANI COCKETT, AND STELLA K. COCKETT, SOLE BENEFICIARY UNDER SAID TRUST.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII.

FILED APRIL 26, 1906.

(20,223.)

Supreme Court of the United States, October Term, 1906.

No. 273.

DAVID KAWANANAKOA, JONAH KALANIANAOLE, ABIGAIL W. KAWANANAKOA, and ELIZABETH K. KALANIANAOLE, Appellants,

vs.

ELLEN ALBERTINA POLYBLANK, Otherwise Known as Sister ALBERTINA, Trustee for Stella Keomailani Cockett, and STELLA K. COCKETT, Sole Beneficiary under said Trust, Appellees.

Appeal from the Supreme Court of the Territory of Hawaii.

Stipulation.

Whereas the Demurrer of the Territory of Hawaii, one of the respondents named in the Bill of Complaint herein, was inadvertently omitted from the præcipe, designating parts of the record to be included in the transcript herein, and was by reason thereof not included in said transcript;

It is therefore stipulated and agreed by and between David Kawananakoa, Jonah Kalanianaole, Abigail W. Kawananakoa, and Elizabeth K. Kalanianaole, appellants, and Ellen Albertina Polyblank, otherwise known as Sister Albertina, Trustee for Stella Keomailani Cockett, and Stella K. Cockett, sole beneficiary under said trust, through their respective attorneys, that the annexed certified copy of said Demurrer may be filed herein and may be treated and considered a part of the record for all purposes as if it had been duly and regularly included in said transcript.

Dated Honolulu, February 19, 1907.

SIDNEY M. BALLOU,
Attorneys for Appellants.
A. B. BROWNE,
ALEX. BRITTON,
Attorneys for Appellees.

In the Circuit Court of the First Circuit, Territory of Hawaii, at Chambers.

Equity No. —. In Probate.

ELLEN ALBERTINA POLYBLANK, Otherwise Known as Sister ALBERTINA, Trustee for Stella Keomailani Cockett, Complainant,

vs.

DAVID KAWANANAKOA, JONAH KALANIANAOLE, ABIGAIL W. KAWANANAKOA, ELIZABETH K. KALANIANAOLE, THE GERMAN SAVINGS & LOAN SOCIETY OF SAN FRANCISCO, a Corporation, and THE TERRITORY OF HAWAII, Respondents.

Bill for Foreclosure of Mortgage.

Demurrer of the Respondent, the Territory of Hawaii.

Now comes the Territory of Hawaii, by Lorrin Andrews, Attorney General, respondent in the above entitled action, and demurs to complainant's Bill of Complaint on file herein on the ground that said Bill of Complaint does not state facts sufficient to constitute a cause of action.

THE TERRITORY OF HAWAII, *Respondent,*
By L. ANDREWS, *Attorney General.*

I hereby certify that the said demurrer is not interposed for the purpose of delay.

L. ANDREWS,
Attorney General.

Service of a copy of the within Demurre- this day admitted.
Dated Honolulu, Oct. 27, 1904.

E. A. DOUTHITT,
Attorney for Complainant.

(Endorsed:) Circuit Court of the First Circuit, Territory of Hawaii, at Chambers. In Equity. Ellen Albertina Polyblank, otherwise known as Sister Albertina, Trustee for Stella Keomailani Cockett, Complainant, *vs.* David Kawananakoa, Jonah Kalanianaole, Abigail W. Kawananakoa, Elizabeth K. Kalanianaole, the German Savings & Loan Society, a corporation, and the Territory of Hawaii, Respondents. Demurrer of Respondent, the Territory of Hawaii. Filed October 27, 1904, at 10:18 A. M. J. A. Thompson, Clerk. Lorrin Andrews, Attorney General.

Certificate of Clerk.

HONOLULU, OAHU, *Territory of Hawaii, ss:*

I, Henry Smith, Clerk of the Supreme Court of the Territory of Hawaii, do hereby certify the above and foregoing copy of the Demurrer of the Territory of Hawaii, together with the endorsements thereon filed with the Clerk of the Circuit Court of the First Circuit of the Territory of Hawaii in the case entitled in said Circuit Court "Ellen Albertina Polyblank, otherwise known, as Sister Albertina, Trustee for Stella Keomailani Cockett and Stella K. Cockett, sole beneficiary under said trust, *vs.* David Kawananakoa, Jonah Kalanianaole, Abigail W. Kawananakoa and Elizabeth K. Kalanianaole, and the German Savings & Loan Society, a corporation, and the Territory of Hawaii, to be a full, true and correct copy of said Demurrer.

And I do further certify that said Demurrer was a part of the record before the Supreme Court of the Territory of Hawaii in said cause.

In testimony hereof I have hereunto set my hand and caused the seal of the Supreme Court of the Territory of Hawaii to be hereunto affixed at Honolulu in said Territory this 19th day of February, A. D. 1907.

[Seal Supreme Court, Territory of Hawaii.]

HENRY SMITH,

Clerk of the Supreme Court of the Territory of Hawaii.

[Endorsed:] File No. 20,223. Supreme Court U. S., October Term, 1906. Term No. 273. David Kawananakoa *et al.*, App'ts, *vs.* Ellen Albertina Polyblank *et al.* Stipulation and addition to record. Filed March 6", 1907.

(20,223.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1906.

No. 273.

DAVID KAWANANAKOA, JONAH KALANIANAOLE, ABIGAIL W. KAWANANAKOA, AND ELIZABETH K. KALANIANAOLE, APPELLANTS,

vs.

ELLEN ALBERTINA POLYBLANK, OTHERWISE KNOWN AS SISTER ALBERTINA, TRUSTEE FOR STELLA KEOMAILANI COCKETT, AND STELLA K. COCKETT, SOLE BENEFICIARY UNDER SAID TRUST.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII.

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1 In the Supreme Court of the Territory of Hawaii.

DAVID KAWANANAKOA, JONAH KALANIANAOLE, ABIGAIL W. KAWANANAKOA, and ELIZABETH K. KALANIANAOLE, Appellants,

vs.

ELLEN ALBERTINA POLYBLANK, Otherwise Known as SISTER ALBERTINA, Trustee for Stella Keomailani Cockett, and STELLA K. COCKETT, Sole Beneficiary under said Trust, Appellees.

Præcipe Designating Parts of Record to be Included in Transcript.

To Henry Smith, Clerk of the Supreme Court of the Territory of Hawaii:

You are requested to make a transcript of the record in the Supreme Court of the Territory of Hawaii in the cause entitled in said Court "Ellen Albertina Polyblank, otherwise known as Sister Albertina, Trustee for Stella Keomailani Cockett and Stella K. Cockett, sole beneficiary under said Trust, *vs.* David Kawananakoa, Jonah Kalanianaole, Abigail W. Kawananakoa and Elizabeth K. Kalanianaole and The German Savings & Loan Society, a corporation" and to include in such transcript of record the following and no other papers and exhibits, to wit:

1. Bill of Complaint.
2. Summons.
3. Plea of David Kawananakoa, Jonah Kalanianaole, Abigail W. Kawananakoa and Elizabeth K. Kalanianaole.
4. Answer of the German Savings & Loan Society.
5. Dismissal as to the Territory of Hawaii.
6. Amended answer of David Kawananakoa, Jonah Kalanianaole, Abigail W. Kawananakoa and Elizabeth K. Kalanianaole.
7. Decree of foreclosure.

2 8. Copy of Clerk's Minutes.

9. Notice of appeal.
10. Decision of Supreme Court rendered October 23, 1905.

Respectfully,

SIDNEY M. BALLOU,
Attorneys for Appellants.

3 In the Circuit Court of the First Circuit, Territory of Hawaii, at Chambers. In Equity.

Equity. No. —.

(Stamps, $2.00.)

M. T. S., Clerk.

ELLEN ALBERTINA POLYBLANK, Otherwise Known as SISTER ALBERTINA, Trustee for Stella Keomailani Cockett, and STELLA KEOMAILANI COCKETT, Sole Beneficiary under said Trust, Complainant-,

vs.

DAVID KAWANANAKOA, JONAH KALANIANAOLE, ABIGAIL W. KAWANANAKOA, ELIZABETH K. KALANIANAOLE, THE GERMAN SAVINGS AND LOAN SOCIETY, a Corporation, and THE TERRITORY OF HAWAII, Respondents.

M. T. S.

Bill for Foreclosure of Mortgage.

Bill of Complaint.

To the Presiding Judge, at Chambers, of the Circuit Court of the First Circuit, Territory of Hawaii:

The Petition of Ellen Albertina Polyblank, otherwise known as Sister Albertina, Trustee for Stella Keomailani Cockett, respectfully shows unto your Honor:

I.

That complainant and the respondents David Kawananakoa, Jonah Kalanianaole, Abigail W. Kawanakoa, and Elizabeth K. Kalanianaole, are all residents of Honolulu, Island of Oahu, Territory of Hawaii.

That the respondent The German Savings and Loan
M. T. S. Society is a corporation organized and existing under and by virtue of the laws of the State of California, and also doing business at Honolulu, Island of Oahu, Territory of Hawaii.

4 II.

That on the 19th day of October, 1899, Stella Keomailani Cockett, of Honolulu, Island of Oahu, Territory of Hawaii, signed, sealed and delivered to Complainant Ellen Albertina Polyblank, under the name of Sister Albertina, a certain deed of trust in and to the hereinafter described property a copy of which said deed of trust is annexed hereto and made a part hereof, marked "Exhibit A;" and that at the time of the execution and delivery of said deed of trust James D.

Cockett of Honolulu, Island of Oahu, Territory of Hawaii was the husband of said Stella Keomailani Cockett, and as such joined in the execution of said deed of trust in token of his consent thereto and in release of all his right title, or interest in and to said property hereinafter described.

III.

That under and by virtue of the terms and conditions of the aforesaid deed of trust, the said Ellen Albertina Polyblank as such trustee, was empowered and directed in her discretion at any time upon the request of the said Stella Keomailani Cockett, to sell and convey the property therein conveyed, a portion of which is hereinafter and in the next paragraph hereof described.

IV.

That on the 8th day of May, A. D. 1902, the said Complainant Ellen Albertina Polyblank, as such trustee, together with the said Stella Keomailani Cockett in her own right, and the said James D. Cockett, husband of the said Stella Keomailani Cockett, joining therein in token of his consent thereto, did execute under their hands and seals and deliver to the said respondents David Kawananakoa and Jonah Kalanianaole a certain deed, a copy of which is annexed hereto and made a part hereof marked "Exhibit B," wherein said Ellen Albertina Polyblank as such trustee, and said Stella Keomailani Cockett, and said James D. Cockett conveyed to the said David Kawananakoa and the said Jonah Kalanianaole all their right title and interest in and to the following described property, to wit:—

All that portion of the land described in Royal Patent No. 4371, L. C. A. 7260 to B. Namakeha, included within the following metes and bounds, to wit: Beginning at the East corner of Grant 2363 on the Waikiki side of Nuuanu Avenue the same being the west corner of the proposed new Extension of Kuakini Street and Nuuanu Avenue, and running as follows by true bearings:

N. 41° 15′ E., 375.0 feet along Nuuanu Avenue;
S. 84° 20′ E., 283.7 feet along Pauoa Road;
N. 89° 44′ E., 134.5 feet along same;
N. 82° 32′ E., 180.6 feet along same;
S. 21° 12′ E., 265.0 feet along Ulu's place;
S. 58° 10′ W., 216.5 feet along L. C. A. 85 F. L. and 6059;
S. 56° 15′ W., 125.0 feet along L. C. A. 236;
S. 62° 05′ W., 82.6 feet along same;
S. 74° 10′ W., 107.5 feet along same;
N. 7° 05′ W., 10.0 feet along L. C. A. 1144B., Apana 2;
S. 86° 35′ W., 52.5 feet along same;
N. 32° 20′ W., 70.0 feet along same;
S. 45° 30′ W., 61.0 feet along same;
N. 41° 20′ W., 161.5 feet along same;
S. 45° 55′ W., 92.0 feet along same and L. C. A. 7675;
N. 49° 15′ W., 215.0 feet along Grant 2363 to the initial point, and containing an area of 316,284 square feet or 7 26/100 acres, more or less.

Excepting and reserving (unto said Grantors) all remaining portion of the land described in said Award and also the lele of
6 the ili of Kaalaa which is covered by Mahele Award No. 61, Royal Patent No. 7429, the title of said lele at the time of the above described conveyance being litigated in the Supreme Court of the Territory of Hawaii.

Complainant further alleges that the above described premises are part of the same premises conveyed to said Ellen Albertina Polyblank, trustee as aforesaid, by deed of trust hereinbefore referred to.

V.

That on the 8th day of May, 1902, the said respondents David Kawananakoa and Jonah Kalanianaole, as and for part of the purchase price of said hereinabove described property, made executed and delivered to complainant as such trustee, their certain promissory note, in words and figures following, to wit:

"$8,000.00. HONOLULU, *May 8th*, 1902.

" One Year after date, for value received, we jointly and severally " promise to pay to Ellen Albertina Polyblank, otherwise known as " Sister Albertina, Trustee for Stella K. Cockett, or order, in Hono- " lulu, the sum of Eight Thousand Dollars, with interest payable " semi-annually at the rate of Seven per cent. per annum during " said term, and for such further time as said principal sum or any " part thereof shall remain unpaid. Both Principal and Interest " payable in Gold Coin of the United States of America of the present " standard of weight and fineness.

"(S'g.) D. KAWANANAKOA.
"(S'g.) J. KALANIANAOLE.

" Executed in presence of
"(S'g.) C. A. LONG.

"Secured by Mortgage of Even Date herewith." (Endorsed on Margin.)

VI.

And that as security for said promissory note said respond-
7 ents David Kawananakoa and Jonah Kalanianaole did execute under their hands and seals and deliver to complainant on said 8th day of May, 1902, a certain mortgage on said above described property, a copy of which said mortgage is attached hereto and made a part hereof, marked "Exhibit C."

VII.

That the said respondent Abigail W. Kawananakoa is, and was at the time of the execution and delivery of said mortgage, the wife of the said David Kawananakoa, and that the said Elizabeth K. Kalanianaole is and was at the time of the execution and delivery of said mortgage the wife of the said Jonah Kalanianaole; and that the said respondents Abigail W. Kawananakoa and Elizabeth K. Kalania-

naole signed and sealed said mortgage at the time the same was executed by the said David Kawananakoa and the said Jonah Kalanianaole for the purpose of releasing all right or possibility of dower in and to the above described premises; and that by and under the terms of said mortgage the said Abigail W. Kawananakoa and the said Elizabeth K. Kalanianaole did release all right and possibility of dower in and to the said above described premises.

VIII.

That said mortgage contained the following condition, viz: that if the said David Kawananakoa and the said Jonah Kalanianaole should pay unto complainant the sum of Eight Thousand Dollars within One Year from the date thereof, with interest semiannually at the rate of seven per cent. per annum thereon, and until such payment, should pay all taxes and assessments on the above described premises, then said above described mortgage together with said above described note should be void.

IX.

That said mortgage was duly acknowledged on the said 8th
8 day of May, 1902, and recorded in the Office of the Registrar of Conveyances at Honolulu, Oahu, on the said 8th day of May, 1902, in Liber 232 on pages 422, 423 and 424.

X.

That default has been made by the said respondents David Kawananakoa and Jonah Kalanianaole in the performance of the condition of said mortgage above referred to.

That the principal sum represented by said note is now due and that the interest thereon has not been paid since the 25th day of June, 1903; and that there is now due and unpaid on said note and mortgage the whole of the principal sum secured thereby, together with interest thereon at the rate of seven per cent. per annum from the 25th day of June, 1903.

XI.

That demand has been made upon the said respondents David Kawananakoa and Jonah Kalanianaole for the payment of the principal sum mentioned in said note and mortgage together with the accrued interest thereon, but that the said respondents David Kawananakoa and Jonah Kalanianaole have, and each of them has, refused and neglected and still refuse and neglect to pay the same, or any portion thereof.

XII.

That the respondent The German Savings and Loan
M. T. S. Society, has or claims some interest in or lien upon said above described premises, the exact nature of which is unknown to complainant, but the same whatever it may be is subsequent to and subject to the lien of said mortgage.

XIII.

That the respondent the Territory of Hawaii has or claims to have some interest or claim upon said above described premises or some portion thereof, as a purchaser, the exact nature of which is unknown to complainant, but the same whatever it may be is subsequent to and subject to the lien of complainant's mortgage.

XIV.

That by reason of the facts hereinbefore set forth complainant is entitled to a foreclosure of said mortgage for the payment of said indebtedness together with legal interest thereon and to a sale of the property described in said mortgage to satisfy complainant's claim.

XV.

That complainant has no plain, speedy or adequate remedy at law and complainant can have relief only in a court of equity where matters of this kind are properly cognizable.

Wherefore, complainant prays as follows:

1. That said respondents and each of them be summoned to appear and answer this bill of complaint.

2. That the amount due and payable to complainant under said mortgage may be ascertained by the Court.

3. That after a hearing being had hereon, it may be ordered and decreed that said mortgage be foreclosed; that all the property covered thereby may be sold at public auction by a commissioner or other officer of this Court; that the proceeds of such sale, after paying the costs and expenses of foreclosure, together with a reasonable attorney's fee, be applied to the payment of the indebtedness secured by said mortgage; that in case the proceeds of such sale are insufficient to pay such indebtedness that said res-ondents David Kawananakoa and Jonah Kalanianaole be decreed to pay the deficiency to complainant; that said respondents and all persons claiming under them subsequent to the execution of said mortgage upon said premises, either as purchasers, incumbrancers or otherwise, may be barred and forever foreclosed of all rights or claims or equity of redemption in and to the said premises; that complainant may be allowed to become a purchaser at such sale; and for such other, further, and different relief as may be just and equitable.

(Signed) ELLEN ALBERTINA POLYBLANK,
Known as Sister Albertina, Complainant.

Dated: Honolulu, Sept. 26, 1904.

(Signed) E. A. DOUTHITT,
Attorney for Complainant.

TERRITORY OF HAWAII, *Island of Oahu, ss:*

Ellen Albertina Polyblank, otherwise known as Sister Albertina, being first duly sworn, deposes and says: I am the complainant named in the foregoing Bill of Complaint. I have read the same

and know the contents thereof, and the same is true of my own knowledge.

(Signed) ELLEN ALBERTINA POLYBLANK,
Known as Sister Albertina.

Subscribed and sworn to before me this 26th day of Sept. 1904.

(Signed) EDGAR HENRIQUES,
[SEAL.] *Notary Public, First Judicial Circuit, Territory of Hawaii.*

11 EXHIBIT "A."

Deed.

S. K. Cockett
to
S. Albertina, Trustee.

Stamped $2.00.

Know all men by these presents that I, Stella Keomailani Cockett, wife of James D. Cockett (said James D. Cockett joining in this deed in token of his consent thereto and release of all claim to said lands) of Honolulu, Island of Oahu, Hawaiian Islands, party of the first part in consideration of One Dollar ($1) to me paid by Sister Albertina, of St. Andrews Priory, Honolulu, Island of Oahu, Trustee for Stella Keomailani Cockett, party of the second part, the receipt whereof is acknowledged, do hereby grant, bargain, sell and convey to her, the said Sister Albertina, Trustee, all that lot of land in Pauoa, Honolulu, Island of Oahu, being that portion of Land Commission Award No. 7260 to Namakea situate on the makai side of the road leading Southeasterly from Nuuanu Street to Pauoa Valley, being the same premises referred to in the will of B. Namakea, Probate No. 936, Supreme Court of the —.

Also a certain lot in Honuokaha being the ili of Kaalaa in Honolulu, Island of Oahu, described in Mahele Award No. 61, Royal Patent 7429 to B. Namakeha, and also referred to in the will of the said B. Namakeha. To have and to Hold the same with all the privileges and appurtenances to the same belonging to her, the said Sister Albertina, and her successors and assigns forever, but in trust nevertheless as follows: During the life of Stella Keomailani Cockett, wife of James D. Cockett, of Honolulu, to pay over to her the net rents and profits thereof, or at her election to allow her the said Stella K. Cockett to occupy and enjoy the said estate, she paying the taxes and all necessary charges and expenses (and at her
12 death to convey the said estate to her heirs at law); but the said trustee or any successors in said trust, may in her discretion, at any time upon the request in writing of said Stella Keomailani Cockett, sell and convey the said estate, free from the trusts hereby created, holding the proceeds of such sale upon the same trusts as are herein expressed regarding the estate hereby conveyed,

and any purchaser of said estate at any such sale, shall not be answerable for the application of the purchase money, or for the lack of any written request of sale; but the said trustee, or any successor in said trust may, at any time, in her discretion convey and transfer the estate hereby conveyed, or the proceeds thereof, if sold, to the said Stella K. Cockett and the trust hereby created shall thereby be wholly determined, and the Trustee wholly discharged and released therefrom. And I James D. Cockett, husband of said Stella K. Cockett, for and in consideration of the sum of One Dollar (L) do hereby release and quitclaim unto the said Sister Albertina, Trustee, all right or claim present or prospective which — may or can have in and to the premises above named. And I, Sister Albertina, above named *to* hereby accept this trust.

In Witness Whereof, we, the said Stella Keomailani Cockett, James D. Cockett, her husband, and Sister Albertina have hereunto set our hands and seals the day and year first above written.

(S'g.) STELLA K. COCKETT. [SEAL.]
(S'g.) J. D. COCKETT. [SEAL.]
(S'g.) SISTER ALBERTINA. [SEAL.]

HAWAIIAN ISLANDS, *Island of Oahu, ss:*

On this 19th day of October, A. D. 1899, personally ap-
13 peared before me J. D. Cockett and Stella K. Cockett, his wife, known to me to be the persons described in and who executed the foregoing instrument and they severally acknowledged to me that they executed the same freely and voluntarily and for the uses and purposes therein set forth. And said Stella K. Cockett, wife of said J. D. Cockett, on an examination separate and apart from the said husband acknowledged to me that she executed the same freely, without fear or compulsion of her said husband.

[SEAL.] (S'g.) WILLIAM A. HENSHALL,
Notary Public, First Judicial Circuit.

HAWAIIAN ISLANDS, *Island of Oahu, ss:*

On this 19th day of October, A. D. 1899, personally appeared before me Sister Albertina — satisfactorily proved to me to be the person described in and who executed the foregoing instrument by the oath of C. F. Peterson, a credible witness for that purpose to me known and by me duly sworn, and the said Sister Albertina acknowledged to me that she executed the same freely and voluntarily and for the uses and purposes therein set forth.

(S'g.) WILLIAM A. HENSHALL,
[SEAL.] *Notary Public, First Judicial Circuit.*

14 EXHIBIT "B."

Deed.

S. K. Cockett & Husband, by Trustee,
to
D. Kawananakoa *et al.*

U. S. Rev. Stamps $4.75.
Stamped $48.00.

Know all men by these presents that we, Ellen Albertina Polyblank, otherwise known as Sister Albertina, Trustee for Stella K. Cockett, under Deed of Trust dated October 19th, A. D. 1899, which Deed of Trust is duly placed for record with these presents in the Office of the Registrar of Conveyances, and the said Stella K. Cockett, in her own right, and James D. Cockett, her husband, joining herein, in token of his consent hereto, all of Honolulu, Island of Oahu, Territory of Hawaii, for and in consideration of the sum of Eleven Thousand Eight Hundred and Thirty Two Dollars ($11,832.00) to us paid by David Kawananakoa and Jonah Kalanianaole, both of said Honolulu, the receipt whereof is hereby acknowledged, do hereby remise, release and forever quitclaim unto the said David Kawananakoa and Jonah Kalanianaole, and their heirs and assigns forever, all that portion of the land described in Royal Patent No. 4371, L. C. A. 7260, to B. Namakeha, included within the following metes and bounds, to wit:

Beginning at the East corner of Grant 2363 on the Waikiki side of Nuuanu Avenue, the same being the West corner of the proposed new extension of Kuakini Street and Nuuanu Avenue, and running as follows by true bearings:

N. 41 15′ E., 375.0 feet along Nuuanu Avenue;
S. 84 20′ E., 283.7 " " Pauoa Road;
N. 89 44′ E., 134.5 " " same;
N. 82 32′ E., 180.6 " " "
S. 21 12′ E., 265.0 " " Ulu's place;
S. 58 10′ W., 216.5 " " L. C. A. 85 F. L. and 6059;
S. 56 15′ W., 125.0 " " L. C. A. 236;
S. 62 05′ W., 82.6 " " same;
S. 74 10′ W., 107.5 " " "
N. 7 05′ W., 10.0 " " L. C. A. 1144, Apana 2;

15

S. 86 35′ W., 52.5 " " same;
N. 32 20′ W., 70.0 " " "
S. 45 30′ W., 61.0 " " "
N. 41 20′ W., 161.5 " " "
S. 45 55′ W., 92.0 feet along same and L. C. A. 7675;
N. 49 15′ W., 215.0 " " Grant 2363 to the initial point, and containing an area of 316,284 square feet or 7 26/100 acres, more or less.

Excepting and reserving unto said Grantors all remaining portions of the land described in said Award and also the lele of the ili of Kaalaa, which is covered by Mahele Award No. 61, Royal Patent No. 7429, the title of said lele now being litigated in a suit pending in the Supreme Court of the Territory of Hawaii aforesaid.

To have and to hold the above remised premises, together with all the rights, easements, privileges and appurtenances thereunto belonging, and all the right, title and interest of us and each of us in and to all back rents, issues and profits thereof, unto said David Kawananakoa and Jonah Kalaniānaole, and their heirs and assigns forever.

And for the consideration aforesaid, we and each of us do hereby irrevocably appoint said David Kawananakoa and Jonah Kalaniānaole the attorneys-in-fact of us and each of us and in our names and in the names of each of us or in their own names as they see fit, to ask, demand, sue for and recover all back rents, issues and profits that may be due and owing on said remised premises, and to give valid receipts therefor, and to do and perform all things and execute and deliver all documents and papers necessary or proper to effectuate the premises.

In witness whereof, we, the said Ellen Albertina Polyblank Trustee as aforesaid, and Stella K. Cockett and James D. Cockett, have hereunto set our hands and seals this 8th day of May, A. D. 1902.

16 (S'g'd) ELLEN ALBERTINA POLYBLANK, [L. S.]
Otherwise Known as Sister Albertina,
Trustee for Stella K. Cockett.
" STELLA K. COCKETT. [L. S.]
" J. D. COCKETT. [L. S.]

Signed, sealed, executed and delivered in the presence of
EDMUND H. HART.

UNITED STATES OF AMERICA,
Territory of Hawaii, Island of Oahu, ss:

On this eighth day of May, A. D. 1902, personally appeared before me Ellen Albertina Polyblank, otherwise known as Sister Albertina, Trustee for Stella K. Cockett, and Stella K. Cockett, and J. D. Cockett, her husband, all known to me to be the persons described in and who executed the foregoing instrument and they severally acknowledged to me that they executed the same freely and voluntarily and for the uses and purposes therein set forth. And said Stella K. Cockett on a private examination by me, had separate and apart from her said husband, further acknowledged to me that she executed the same freely and without fear, compulsion or constraint of her said husband.

(S'g'd) EDMUND H. HART, [SEAL.]
Notary Public, First Judicial Circuit.

Recorded May 8th, A. D. 1902, at 3:01 P. M.

17 EXHIBIT "C."

Stamped $15.00.

Know all men by these presents, that we, David Kawananakoa and Jonah Kalanianaole, both of Honolulu, Island of Oahu, Territory of Hawaii, hereinafter designated the Mortgagors, for and in consideration of the sum of Eight Thousand Dollars, ($8,000.00), to us in hand paid Ellen Albertina Pollyblank, of said Honolulu, otherwise known as Sister Albertina, Trustee for Stella K. Cockett, of said Honolulu, hereinafter designated the Mortgagee, the receipt whereof is hereby acknowledged, do hereby give, grant, bargain, sell and convey unto said Mortgagee, and her heirs, successors in trust and assigns forever, all that land situate at Kaalaaluna, in said Honolulu, being a portion of the land described in Royal Patent No. 4371, L. C. A. 7260 to B. Namakeha and conveyed in deed from Sister Albertina, Trustee as aforesaid and said Stella K. Cockett and James D. Cockett, her husband, to said Mortgagors, dated this day and executed concurrent herewith, and duly placed for record with these presents in the Office of the Registrar of Conveyances, in said Honolulu.

To have and to hold the above granted premises, together with all the rights, easements, privileges and appurtenances thereunto belonging, unto the said Mortgagee, and her heirs, successors in trust and assigns forever.

And for the consideration aforesaid, we, Abigail W. Kawananakoa, wife of said David Kawananakoa, and Elizabeth K. Kalanianaole, wife of said Jonah Kalanianaole, do hereby severally release unto said Mortgagee, and her heirs, successors in trust and assigns forever, all right or possibility of Dower in and to the said granted premises.

Provided Nevertheless, that if we, or our heirs, executors, administrators or assigns, shall pay unto the said Mortgagee, or her
18 heirs, executors, administrators, successors in trust or assigns, the sum of Eight Thousand Dollars ($8000.00) in One Year from this date, with interest semi-annually at the rate of seven per cent. per annum, and until such payment shall pay all taxes and assessments to whomsoever laid or assessed, whether on the granted premises or any interest therein or on the debt secured thereby, then this deed, as also a note of even date herewith signed by us, whereby we jointly and severally promise to pay to the said Mortgagee, or order, the said sum and interest at the times aforesaid, shall be void.

But upon any default in the performance or observance of the foregoing condition, the said Mortgagee, her heirs, successors in trust or assigns, may sell the granted premises or any portion thereof, together with all improvements that may be thereon, at Public Auction, according to the provisions of the laws of the Territory of Hawaii providing for the sale of mortgaged property without suit or foreclosure proceedings, and may convey the premises so sold by proper deed or deeds to the purchaser or purchasers absolutely and in fee simple, and such sale shall forever bar us and all persons

claiming under us from all right and interest in the said premises, whether at law or in equity, and out of the money arising from such sale, the said Mortgagee, or her representatives shall be entitled to retain all sums then secured by this deed, including all costs, charges and expenses, and a reasonable attorney's fee, incurred or sustained by them by reason of any default in the performance or observance of said conditions, rendering the surplus, if any, to us or our heirs or assigns.

And we hereby, for ourselves and our heirs and assigns, covenant with the said Mortgagee, and her heirs, executors, administrators, successors in trust, and assigns, that in case a sale shall be
19 made under the foregoing power, we or they will upon request, execute, acknowledge and deliver to the purchaser or purchasers a deed or deeds of release confirming such sale.

This Mortgage is given as part of the purchase price of the property conveyed by said deed hereinbefore mentioned of said Sister Albertina, Trustee, and Stella K. Cockett and James D. Cockett, her husband, to said Mortgagors herein.

In witness whereof, we, the said David Kawananakoa and Abigail W. Kawananakoa, his wife, and Jonah Kalanianaole and Elizabeth K. Kalanianaole, his wife, have hereunto set our hands and seals, this 8th day of May, A. D. 1902.

(S'g'd) D. KAWANANAKOA. [L. S.]
" ABIGAIL W. KAWANANAKOA. [L. S.]
" J. KALANIANAOLE. [L. S.]
" ELIZABETH K. KALANIANAOLE. [L. S.]

Signed, Sealed, Executed and Delivered in presence of
(S'g'd) C. A. LONG.

TERRITORY OF HAWAII, *Island of Oahu, ss:*

On this 8th day of May, A. D. 1902, personally appeared before me D. Kawananakoa and Abigail W. Kawananakoa, his wife, and Jonah Kalanianaole and Elizabeth K. Kalanianaole, his wife, all known to me to be the persons described in and who executed the foregoing instrument, who severally acknowledged to me that they executed the same freely and voluntarily and for the uses and purposes therein set forth.

And said Abigail W. Kawananakoa and Elizabeth K. Kalanianaole on a private examination had by me separate and apart, from their said husbands further acknowledged to me that they executed the same freely and without fear, compulsion or constraint of their said husbands.

(S'g'd) CARLOS A. LONG,
[NOTARIAL SEAL.] *Notary Public, First Judicial Circuit.*

20 Endorsed: In the Circuit Court, First Circuit, Territory of Hawaii. Ellen Albertina Polyblank, etc., *vs.* David Kawananakoa *et al.* Bill of Complaint. Received 37.00 Filed Sept. 26, 1904. George Lucas, Clerk.

21 In the Circuit Court of the First Circuit, Territory of Hawaii, at Chambers.

(Stamps, $2.00.)

ELLEN ALBERTINA POLYBLANK, Otherwise Known as SISTER ALBERTINA, Trustee for Stella Keomailani Cockett,

v.

DAVID KAWANANAKOA, JONAH KALANIANAOLE, ABIGAIL W. KAWANANAKOA, ELIZABETH K. KALANIANAOLE, THE GERMAN SAVINGS AND LOAN SOCIETY OF SAN FRANCISCO, a Corporation, and THE TERRITORY OF HAWAII.

Chambers Summons.

The Territory of Hawaii to the High Sheriff of the Territory of Hawaii or his Deputy, the Sheriff of the Island of Oahu or his Deputy:

You are commanded to summon David Kawananakoa, Jonah Kalanianaole, Abigail W. Kawananakoa, Elizabeth K. Kalanianaole, The German Savings and Loan Society of San Francisco, a corporation, and the Territory of Hawaii to appear ten days after service hereof, if they reside on the Island of Oahu otherwise twenty days after service, before such Judge of the Circuit Court of the First Circuit as shall be sitting at Chambers in the Court Room at Honolulu, Island of Oahu, Territory of Hawaii to answer the annexed Bill of Complaint of Ellen Albertina Polyblank, otherwise known as Sister Albertina.

And you are further commanded, by order of Hon. —— ——, Judge of the Circuit Court of the — Circuit.

And have you then there this Writ with full return of your
22 proceedings thereon.

Witness the First Judge of the Circuit Court of the First Circuit at Honolulu this 26th day of September 1904.

[SEAL.] (Signed) GEORGE LUCAS, *Clerk.*

§ 1278, Civil Laws. The time within — an act is to be done * * * shall be computed by excluding the first day and including the last. If the last day be Sunday, it shall be excluded.

Endorsed: E. 1431. Circuit Court First Circuit. Ellen Albertina Polyblank etc. *v.* David Kawananakoa, *et al.* Chambers Summons and Complaint. Issued at 2-15 o'clock P. M. Sept. 26, 1904. George Lucas, Clerk. Returned at 3 o'clock P. M., October 10, 1904. J. A. Thompson, Clerk. Service at $1.00 each, $—. Cop. at $1.50 each, $—. Expense, —. Total, $—. E. A. Douthitt, Att'y for Complainant, Campbell Building, Honolulu, H. T. Served this Summons as follows: On Jonah Kalanianaole Elizabeth K. Kalanianaole and on the Territory of Hawaii, through Lorrin Andrews as the Attorney

General of the Territory of Hawaii, all of Honolulu, Oahu, at Honolulu, Oahu, this 3rd day of October, A. D. 1904. On David Kawananakoa, Abigail Kawananakoa and on the Territory of Hawaii through Charles F. Chilingworth Dep't. Sheriff of the Territory of Hawaii, at Waimea Hawaii this 5th day of Oct. A. D. 1904 by delivering to each of them a certified copy hereof, and of the Petition hereto annexed, and at the same time showing each of them the original as directed. Dated October 3rd, 1904. Albert McGurn, Deputy Sheriff, W. M. S. Lindsey Dep't. Sheriff. Served the within Summons and Petition on the within named The German Savings and Loan Society of San Francisco, through W. O. Smith, as a person upon whom legal process may be served, by delivering to said W. O. Smith certified copies thereof at Honolulu, Oahu, this 3rd day of October, A. D. 1904, and at the same time showing him the original as directed. Dated Honolulu, Oahu, October 3rd, A. D. 1904. Albert McGurn Deputy Sheriff, Territory of Hawaii. High Sheriff's Office Honolulu, H. T. Served the within Summons as follows: On the within named David Kawananakoa and Abigail W. Kawananakoa, at Waimea, District of South Kohala, Island and Territory of Hawaii, on the 5th day of October, A. D. 1904, by delivering to each of them a certified copy thereof, and of the petition thereto annexed and at the same time showing each of them the original. W. M. S. Lindsey, Deputy Sheriff, South Kohala, Island of Hawaii.

23 In the Circuit Court for the First Circuit, Territory of Hawaii, at Chambers. In Equity.

ELLEN ALBERTINA POLYBLANK, Otherwise Known as SISTER ALBERTINA, Trustee for Stella Keomailani Cockett, Complainant,

vs.

DAVID KAWANANAKOA, JONAH KALANIANAOLE, ABIGAIL W. KAWANANAKOA, ELIZABETH K. KALANIANAOLE, THE GERMAN SAVINGS AND LOAN SOCIETY OF SAN FRANCISCO, a Corporation, and THE TERRITORY OF HAWAII, Respondents.

Bill for Foreclosure of Mortgage.

Plea of Defendants David Kawananakoa, Jonah Kalanianaole, Abigail W. Kawananakoa, and Elizabeth K. Kalanianaole.

These defendants not hereby confessing all or any of the matters alleged in the Bill of Complaint herein to be true, in manner as the same are therein alleged and set forth; and not hereby waiving, their, or either of their Demurrers, or causes of demurrer to said Bill of Complaint, as heretofore submitted to the court in this cause, but insisting thereon, for a Plea to said Bill of Complaint do allege and submit as follows, that is to say:

1. That on or about the 10th day of September, 1903, and subsequent to the date alleged in said Bill of Complaint as the date on which the promissory note, and the mortgage therein mentioned, and

set forth by Exhibit, were executed, these defendants executed
24 and delivered to Samuel M. Damon, of the City of Honolulu, a certain Deed of Conveyance of and concerning a portion of the premises mentioned and described in said Bill of Complaint, and in the mortgage therein alleged to have been executed, and thereto attached by Exhibit, a copy of which said Deed of Conveyance is hereto annexed, Marked Exhibit "A" and made a part of this Plea.

2. That thereafter, to-wit, on the 7th day of November, 1903, said Samuel M. Damon executed and delivered to The Territory of Hawaii, a certain Deed of Conveyance wherein and whereby he, the said Samuel M. Damon did convey to said Territory of Hawaii, certain of the land and premises included in and covered and affected by the mortgage so alleged in said Bill of Complaint to have been executed by these defendants, to said plaintiff, Sister Albertina, as Trustee for said plaintiff Stella Keomailani Cockett, to-wit, the land and premises which had been theretofore so conveyed by these defendants to said Samuel M. Damon as aforesaid.

3. That said land and premises so conveyed as aforesaid to said Samuel M. Damon, and by said Samuel M. Damon so as aforesaid conveyed to said Territory, is and are now owned by The Territory of Hawaii, in its political and public capacity, and is and are now in the possession of The Territory of Hawaii, and of the Executive Officers of said Territory, to-wit, the Superintendent of Public Works of said Territory, and said land and premises so conveyed as aforesaid has and have been and is and are now included in and used as a part of certain of the public streets and highways within the City and District of Honolulu, to-wit, of a certain street and highway commonly called by the name of Pauoa Road.

4. That the interests and equities of all persons concerned in and under the mortgage aforesaid cannot be adjusted and deter-
25 mined by this Honorable Court, in that it is beyond the power and jurisdiction of this Honorable Court to make or render such decree in this cause as will or can subject that portion of said mortgaged land and premises which has been so conveyed by these defendants to said Samuel M. Damon, and has been so conveyed by said Samuel M. Damon to said Territory, to sale in satisfaction of the lien of said mortgage, as the same is, in and by said Bill of Complaint, alleged to exist; and that it is beyond the authority and jurisdiction of this Honorable Court to subject the portion of said mortgaged land and premises so conveyed as aforesaid, to its proportionate share, or to any share of the lien or incumbrance of said mortgage; and that it is beyond the authority and jurisdiction of this Honorable Court to decree the delivery of the possession of said portion of said mortgaged land and premises so conveyed as aforesaid, from and out of the possession of said Territory; or (and) of its said Executive Officer, the Superintendent of Public Works aforesaid.

5. And these defendants submit that they have a right to insist that the matters alleged and set forth in said Bill of Complaint shall be determined and adjudicated, (if at all) in and before a court possessing full and ample jurisdiction of all the parties in interest, and full and ample authority and jurisdiction to deal with all and singu-

lar the premises mentioned, described and conveyed in and by the mortgage mentioned in said Bill of Complaint; and having full and ample authority and jurisdiction to dispose of all and singular the premises so mortgaged, and to subject the same to the lien, (if any) of said mortgage, and to decree and enforce its decree for the sale, and for the delivery of possession of all and singular the land, property, and premises mentioned, described, conveyed and included in and by the mortgage in said Bill of Complaint mentioned,
26 in the event that a sale of said property or any thereof, shall be ordered and adjudged in and by the final decree herein.

Wherefore these defendants respectfully submit that this Honorable Court hath no jurisdiction to grant the relief prayed in said Bill of Complaint, and, for lack of such authority and jurisdiction as aforesaid, should not proceed further in the hearing or determination of the cause, matters and things alleged in said Bill of Complaint.

And these defendants respectively, humbly submit and pray judgment of the court here, whether they, or any of them should be obliged to make any other or further answer to the matters and things alleged and set forth in said Bill of Complaint; and they further pray that they may be hence dismissed, without day, together with their reasonable costs in this behalf sustained.

Dated this 28th day of November, 1904.

DAVID KAWANANAKOA,
JONAH KALANIANOLE,
ABIGAIL W. KAWANANAKOA,
ELIZABETH K. KALANIANAOLE,
Defendants,

(Signed) By C. W. ASHFORD, *Their Attorney.*

TERRITORY OF HAWAII, *Island of Oahu, ss:*

C. W. Ashford having been duly sworn, deposes and says:

That he is the Attorney of Record for the above named defendants, David Kawananakoa, Jonah Kalanianaole, Abigail W. Kawananakoa and Elizabeth K. Kalanianaole whose Plea in the above entitled cause precedes this jurat. That Deponent is familiar with all of the facts and circumstances set forth in said Plea, and here verifies the same on behalf of said defendants, and each of them; and that the matters and things alleged in said Plea are true, within the knowledge of this Deponent.

(Signed) C. W. ASHFORD.

Sworn to before me this 28th day of November, 1904.

(Signed) M. T. SIMONTON,
Clerk of the Circuit Court, First Circuit, Territory of Hawaii.

27 EXHIBIT "A."

Deed.

David Kawananakoa
to
Samuel M. Damon.

Stamped $6.00.

This Indenture made this 10th day of September, A. D., 1903, by and between David Kawananakoa and Jonah Kalanianaole, hereinafter named the Grantors, (which expression shall include their respective heirs, executors, administrators, and assigns,) parties of the first part, and Samuel M. Damon, hereinafter named the Grantee, party of the second part, all of Honolulu, Island of Oahu, Territory of Hawaii,

Witnesseth:—

The said Grantors for and in consideration of the sum of Twelve Hundred Ninety and 70/100 Dollars, ($1290.70) to them in hand paid by said Grantee, the receipt whereof is hereby acknowledged, have and each of them has bargained and sold, and do and each of them does hereby grant, convey, remise, release and confirm unto said Grantee, his heirs, and assigns all and singular those certain lands and premises situated at Kaalaaluna, Pauoa, contained in Royal Patent No. 4371 L. C. A. 7260 to B. Namakeha, and which said premises hereby granted consist of four separate pieces or parcels which are respectively and more particularly described by metes and bounds in the schedule hereto attached and made a part of this Conveyance.

To have and to hold the above described and granted premises together with all and singular the tenements, hereditaments, and appurtenances thereon standing, or thereunto in anywise belonging or appertaining unto said Grantee, and his heirs and assigns forever.

And for the consideration aforesaid, the above named Grantors do, and each of them does hereby covenant and agree to and
28 with the said Grantee, and his heirs and assigns that they the Grantors aforesaid are legally seized of the premises above described and conveyed in fee simple; that they have good and legal right to sell and convey the same, and that they will, and their respective heirs, executors and administrators shall well and truly warrant and defend the title thereto in said Grantee; and his heirs and assigns against the lawful claim or claims of any and all persons whomsoever.

And Abigail W. Kawananakoa, wife of said David Kawananakoa, in consideration of One Dollar, ($1.00) to her paid by said Grantee, the receipt whereof is hereby acknowledged, does hereby release and quitclaim to the said Grantee all of her right or possibility of dower in and to the said granted premises.

And Elizabeth K. Kalanianaole, wife of said Jonah Kalanianaole

in consideration of One Dollar ($1.00) to her paid by said Grantee, the receipt whereof is hereby acknowledged, does hereby release and quitclaim to the said Grantee all of her right or possibility of dower in and to said granted premises.

In witness whereof said Grantors and their said wives have hereunto set their hands and seals the day and year first above written.

(Sig.) DAVID KAWANANAKOA.
JONAH KALANIANAOLE.
ABIGAIL W. KAWANANAKOA.
ELIZABETH K. KALANIANAOLE.

Executed in presence of

(Sig.) EDMUND H. HART.

29 *Schedule Hereinabove Referred to.*

First: Beginning at a point on the fence separating T. Olivero property from that of the Kapiolani Estate, Limited, which point bears S. 89° 59′ 30″ E. distance 193.5 feet, from the intersection of Nuuanu Avenue with the new South line of Pauoa Road as shown on Government Survey Registered Map No. 2004, and running by true bearings:

S. 89° 59′ 30″ E. 122.2 feet along new South Line of Pauoa Road to fence corner;
N. 84° 52′ W. 121.2 feet along Old South line of Pauoa Road to old fence corner;
S. 7° 40′ W. 11.1 feet along fence to point of beginning.
Area 660 Square Feet.

Second: Beginning at a point on the new South line of Pauoa Road S. 89° 59′ 30″ E., 446.5 feet from the intersection of the new South line of Pauoa Road and Nuuanu Avenue, as shown on Government Survey Registered Map No. 2004 and running by true bearings:

S. 89° 59′ 30″ E. 187.8 feet along new South line of Pauoa Road;
N. 20° 55′ W. 24.0 feet along fence;
S. 83° 00′ W. 180.8 feet along present South line of Pauoa Road to point of beginning.
Area 2088 Square Feet.

Third: Beginning at a point on the new South line of Pauoa Road S. 89° 59′ 30″ E. 634.3 feet from the intersection of the new South line of Pauoa Road and Nuuanu Avenue as shown on Government Survey Registered Map No. 2004 and running by true bearings:

S. 89° 59′ 30″ E. 72.2 feet along new South line of Pauoa Road. Thence along a curve to the right direct bearing and distance being

S. 75° 8′ E. 38 feet,
S. 62° 00′ E. 55.4 feet along new South line of Pauoa Road;
N. 21° 25′ E. 14.7 feet along fence,
N. 58° 27′ W. 71.5 feet to fence corner;
N. 69° 50′ W. 7.6 feet along Old South line of Pauoa Road;
N. 80° 30′ W. 44.8 feet along Old South line of Pauoa Road;
N. 85° 32′ W. 24.2 feet along Old South line of Pauoa Road;
S. 82° 3′ W. 36.2 feet along Old South line of Pauoa Road;
S. 20° 55′ E. 24.0 feet along fence to point of beginning.
Area 3656 Square Feet.

30 Fourth: Beginning at a point where the new South Line of Pauoa Road intersects the North-west Boundary of L. C. A. 11 F. L. to Kapule, said point being opposite Booth Road, as shown on Government Survey Registered Map No. 2004 and running by true bearings:

N. 38° 31′ E. 8.6 feet along center of stone wall;
N. 59° 40′ W. 156.0 feet along present street line;
S. 21° 25′ E. 14.7 feet along fence;
S. 62° 00′ E. 152.8 feet along new South line of Pauoa Road to point of Beginning.
Area 1771 Square Feet.

(Signed) DAVID KAWANANAKOA.
" JONAH KALANIANAOLE.

Endorsed: E. 1431. Circuit Court, First Circuit. Territory of Hawaii. At Chambers. In Equity. Ellen Albertina Polyblank, otherwise known as Sister Albertina, Trustee for Stella Keomailani Cockett, *vs.* David Kawananakoa, *et al.* Respondents. Plea of Defendants David Kawananakoa, Jonah Kalanianole, Abigail W. Kawananakoa and Elizabeth K. Kalanianaole. Filed November 28, 1904 at 9 o'clock A. M. M. T. Simonton, Clerk. Clarence W. Ashford, Attorney for Defendants.

In the Circuit Court of the First Circuit, Territory of Hawaii, at Chambers. In Equity.

Before Robinson, J.

ELLEN ALBERTINA POLYBLANK (Otherwise Known as SISTER ALBERTINA), Trustee for Stella Keomailani Cockett, Complainant,

vs.

DAVID KAWANANAKOA, JONAH KALANIANAOLE, ABIGAIL W. KAWANANAKOA, ELIZABETH K. KALANIANAOLE, THE GERMAN SAVINGS AND LOAN SOCIETY OF SAN FRANCISCO, a Corporation, and THE TERRITORY OF HAWAII, Respondents.

Bill for Foreclosure of Mortgage.

Answer of The German Savings and Loan Society, a Corporation.

Now comes The German Savings and Loan Society, one of the defendants in the above entitled action, improperly impleaded herein as The German Savings and Loan Society of San Francisco, and not hereby waiving the many irregularities and insufficiencies in said Complainant's Bill of Complaint contained, for answer thereunto, or to so much thereof as it is advised it is necessary or material to answer, does hereby admit, deny and allege as follows:

I.

It alleges that The German Savings and Loan Society is a corporation organized and existing under and by virtue of the laws of the State of California, and also doing business at Honolulu, Island of Oahu, and elsewhere in the Territory of Hawaii; and this respondent denies that its name is The German Savings and Loan Society
32 of San Francisco, as impleaded in Paragraph I of said Bill, and in the entitlement of said cause, and in Paragraph XII of said Bill.

II.

It alleges that it has no information or knowledge sufficient to enable it to form a belief concerning, or to answer the allegations in said Bill contained and set forth in Paragraphs II, III, IV, V, VI, VII, VIII, IX, X, XI, XIII, XIV, and XV, of said Bill, and, therefore, neither admits nor denies the same, but leaves said Complainant to her proof thereof.

III.

Answering the allegations of Paragraphs XII of said Bill, this respondent admits and alleges that it has and claims a right and interest in the property described and referred to in Paragraph IV of said Bill; and further answering herein in this behalf alleges that on the

31st day of May 1903, the said respondents David Kawananakoa, Jonah Kalanianaole, Abigail W. Kawananakoa and Elizabeth K. Kalanianaole did make, execute and deliver to this respondent a certain Indenture of Mortgage wherein and whereby said respondents did grant, bargain, sell and convey unto this respondent, by way of Mortgage, 1-95/100 acres of the land of Royal Patent 4371, Land Commission Award 7260, to B. Namakeha, the same being a portion of the premises described in said Paragraph IV of said Bill, said mortgage being now recorded in the office of the Registrar of Conveyances in said Honolulu in Liber 237 on pages 133 to 140, said mortgage having been so made and given by way of further security for the repayment to this respondent by the Kapiolani Estate, Limited, of the sum of Three Hundred Thousand Dollars ($300,000.), as will more fully appear in said Indenture of Mortgage, reference whereto is hereby made, and the same made a part hereof.

33 IV.

That the said 1-95/100 acres of land of said Royal Patent 4371 Land Commission Award 7260, to B. Namakeha, referred to in Paragraph III of this Answer, are particularly described as follows:—

All that portion of Royal Patent No. 4371, L. C. A. 7260, to B. Namakeha, at Kaalaa, Pauoa, Honolulu, Oahu, bounded and described as follows:—

Beginning at the West corner of this land on Pauoa Road, the same being the North corner of L. C. A. 5957 B. Apana 3 to Kaholoau, and running by true meridian:

S. 84° 50′ E. 107.4 feet along Pauoa Road;
S. 88° 40′ E. 54.0 feet along same;
N. 88° 30′ E. 80.5 feet along same;
S. 24° 45′ E. 52.0 feet along fence;
N. 54° 20′ W. 13.0 feet along same;
S. 00° 55′ E. 222.3 feet along same;
S. 5° 00′ E. 103.0 feet along same;
S. 55° 18′ W. 23.0 feet along L. C. A. 236 to Kaholo;
N. 5° 05′ W. 36.0 feet along remainder of this land;
S. 84° 12′ W. 180.8 feet along stone wall;
N. 12° 07′ E. 183.0 feet along L. C. A. 5957 B. Apana 4 to Kaholoau;
N. 70° 35′ W. 125.0 feet along same;
N. 9° 20′ E. 171.5 feet along L. C. A. 5957 B. Apana 3 to Kaholoau to the initial point, and containing an area of 1.95/100 acres.

Wherefore, this respondent prays that if after due hearing and adduction of proofs, it shall appear to this Court that the Complainant herein has and holds a first lien and charge upon the property
34 in the fourth paragraph of said Bill described, and that said respondents David Kawananakoa and Jonah Kalanianaole are indebted to said petitioner as in her Bill set forth, and if said

Court shall direct a sale of the mortgaged property according to the prayer in said Bill contained, that the same be not sold as a whole, but that the said 1 95/100 acres hereinabove in Paragraph IV of this mortgage described, be not sold, unless it shall appear that the proceeds of the remaining part of said property shall prove insufficient to pay the amount found to be due said petitioner;

And this respondent further prays that in case such proceeds shall be insufficient to pay in full the sum which may be found due to said petitioner, and it shall be necessary to sell the 1 95/100 acres above described, that all surplus proceeds, if any, which shall remain after the payment of such amount found due said petitioner, shall be paid and delivered to this respondent.

THE GERMAN SAVINGS & LOAN SOCIETY, *Respondent,*

(Signed) By W. O. SMITH, *Its Attorney-in-Fact.*

SMITH & LEWIS,
By LOUIS J. WARREN,
Attorneys for said Respondent.

TERRITORY OF HAWAII, *Island of Oahu, ss:*

William O. Smith of Honolulu, being first duly sworn deposes and says:

That he is the Attorney-in-fact for The German Savings and Loan Society, the respondent whose answer is above set forth, and makes this affidavit on its behalf; that the said answer has been read to him, and he knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein set forth upon information and belief, and as to those matters, he believes it to be true.

(Signed) W. O. SMITH.

Subscribed and sworn to before me this 2nd day of December 1904.

(Signed) WM. J. FORBES,
[SEAL.] *Notary Public, First Judicial Circuit.*

The annexation of a copy of the Indenture of Mortgage referred to in Paragraph III of the foregoing Answer is hereby waived.

(Signed) E. A. DOUTHITT,
Attorney for Complainant.

Endorsed: E. 1431. Circuit Court, First Circuit. At Chambers. In Equity. Before, Robinson, J. Ellen Albertina Polyblank *vs.* David Kawananakoa, *et al.* Answer of Respondent The German Savings and Loan Society. Filed Dec. 3, 1904 at 11:2 A. M. J. A. Thompson, Clerk. Smith & Lewis Attorneys at Law. Judd Building, Honolulu, T. H. Received a copy of the within answer this 3rd day of December, 1904, within the time stipulated wherein within named Respondent might serve and file the same. E. A. Douthitt, Attorney for Petitioner.

36 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii, at Chambers. In Equity.

ELLEN ALBERTINA POLYBLANK, Otherwise Known as SISTER ALBERTINA, Trustee for Stella Keomailani Cockett, and STELLA KEOMAILANI COCKETT, Sole Beneficiary under said Trust, Complainants,

vs.

DAVID KAWANANAKOA, JONAH KALANIANAOLE, ABIGAIL W. KAWANANAKOA, ELIZABETH K. KALANIANAOLE, THE GERMAN SAVINGS AND LOAN SOCIETY, a Corporation, and THE TERRITORY OF HAWAII, Respondents.

Dismissal as to Territory of Hawaii.

Now come the above named plaintiffs by E. A. Douthitt, their attorney, and hereby dismiss, discontinue and abandon their bill of complaint, and right of action thereunder, as to and concerning the respondent, the Territory of Hawaii.

ELLEN ALBERTINA POLYBLANK
ET AL., *Complainants,*

(Signed) By E. A. DOUTHITT, *Their Attorney.*

Endorsed: E. 1431. In the Circuit Court, First Circuit, Territory of Hawaii. In Equity. At Chambers. Ellen Albertina Polyblank *et al., vs.* David Kawananakoa *et al.* Dismissal as to Territory of Hawaii. Filed December 8, 1904. 3:25 P. M. M. T. Simonton, Clerk.

37 In the Circuit Court for the First Circuit, Territory of Hawaii, at Chambers. In Equity.

Equity No. —.

ELLEN ALBERTINA POLYBLANK, Otherwise Known as SISTER ALBERTINA, Trustee for Stella Keomailani Cockett, and STELLA KEOMAILANI COCKETT, Plaintiffs,

vs.

DAVID KAWANANAKOA, JONAH KALANIANAOLE, ABIGAIL W. KAWANANAKOA, ELIZABETH K. KALANIANAOLE, THE GERMAN SAVINGS AND LOAN SOCIETY OF SAN FRANCISCO, a Corporation, and THE TERRITORY OF HAWAII, Defendants.

Bill for Foreclosure of Mortgage.

Amended Answer of Defendants David Kawananakoa, Jonah Kalanianaole, Abigail W. Kawananakoa, and Elizabeth K. Kalanianaole.

The above named defendants David Kawananakoa, Jonah Kalanianaole, Abigail W. Kawananakoa and Elizabeth K. Kalanianaole

not hereby waiving their, or either of their demurrer or demurrers to the bill of complaint herein, or any of the matters or causes of demurrer therein set forth, but insisting thereon; and not hereby waiving their joint plea to said bill of complaint, nor any of the matters or causes in said plea set forth, but insisting thereon, by leave of the Court first obtained, present this, their joint amended answer to said bill of complaint, and, for answer thereto, or to so much and such parts thereof as they are advised it is necessary or material for them to answer unto, they jointly answer as follows:

38 1. They have no knowledge of the corporate character of The German Savings & Loan Society of San Francisco, as alleged in said bill of complaint, and as to such corporate character they leave plaintiffs to their proofs.

2. As to all and singular other the matters alleged in the paragraphs of said bill of complaint numbered respectively I, II, and III, these defendants neither admit nor deny the same, but leave plaintiffs to their proofs thereof.

3. These defendants admit the execution by said plaintiffs and James D. Cockett, on or about May 8, 1902, of the deed, a copy whereof, Marked Exhibit "B," is attached to, and made a part of said bill of complaint. But defendants allege in this behalf, that neither said plaintiff Sister Albertina, as the Trustee of plaintiff Stella Keomailani Cockett, nor said last named plaintiff was or were then the owner or owners of the property which said deed purports to convey, but that on the contrary these defendants David Kawananakoa and Jonah Kalanianaole were then and there the owners in fee simple of a certain portion of the land and premises within the metes and bounds purported to be conveyed by said last mentioned deed to said last mentioned defendants; and that the portion thereof then and there so owned by said last named defendants was, to-wit, a portion of L. C. A. 7260, R. P. 4371 to B. Namakeha, and was and were the same land and premises more particularly described in a certain schedule Marked Exhibit "A," hereto attached and made a part of this answer; and was and were then and there known as the patches or lois of Nakamakaweuweu, and that, at the time of the execution of said last mentioned deed it was well known and conceded by said plaintiffs that said last named defendants were then and there the owners in fee simple of said last mentioned and described patches or lois; and that it was not the intent or purpose of any of the

39 parties to said deed that said plaintiffs or either of them were or was thereby conveying to said last named defendants, or either of them, any part, or portion of said patches or lois of Nakamakaweuweu; but that, on the contrary it was then and there well known and understood by all the parties to said deed that said plaintiffs had not, nor had either of them, any right, title or interest whatsoever in or to said patches or lois of Nakamakaweuweu. And defendants further allege that the reasons which prompted the parties to said deed to include, and have included therein the metes and bounds therein expressed, then and there was the ignorance or doubt of said plaintiffs as to the precise location and identity of said patches or lois of Nakamakaweuweu, and that it was considered and deter-

mined by said parties that the safest and best manner of describing the grant intended to be made by said plaintiffs to said last mentioned defendants, in such manner as to effectually convey all and singular the rights of said plaintiffs, or either of them, in and to that portion of said L. C. A. 7260, was to follow the metes and bounds expressed and set forth in the said deed, notwithstanding the fact, then existing and well known to all the parties to said deed, that considerable areas lying within said metes and bounds, other than said patches or lois of Nakamakaweuweu, were then and there owned by third parties, to wit, Kapiolani Estate, Limited, and the Trustees under the Will of Bernice Pauahi Bishop, and one A. B. Silveira, and in which neither said plaintiffs nor said last named defendants had any right, title or interest whatsoever.

4. That the consideration for said conveyance by said plaintiffs and said James D. Cockett to said last named defendants was then and there the composition and compromise of a certain suit at
40 law which was then pending in the Circuit Court for the First Circuit of the Territory of Hawaii, wherein the plaintiffs herein were the parties-plaintiff, and said defendants David Kawananakoa and Jonah Kalanianaole were the parties-defendant, and also the sum of $11,832.00. That as a part of said transaction said last named defendants paid said plaintiffs the sum of $3832.00 on account of said purchase price, and executed that certain mortgage, attached, by copy, to said bill of complaint as Exhibit "C" thereof.

That it was not the intent or purpose of any of the parties to said transaction, and especially that it was not the intent or purpose of the defendants here answering, or any of said last mentioned defendants, to include within the terms of said last mentioned mortgage, any land or property whatsoever other than the land and property which were, in and by said last mentioned deed conveyed, and, by the parties to said deed intended to be conveyed by said plaintiffs and said James D. Cockett, to said defendants David Kawananakoa and Jonah Kalanianaole; and defendants particularly and expressly allege that it was not then and there their intention, or the intention of any or either of the defendants here answering to include within the terms of said mortgage any land or premises whatsoever which had been, and were then and there owned by the defendants here answering, or any or either of them, and, more particularly, that it was not then or there the intent or purpose of the defendants here answering, or of any or either of them to include, or have included, within the terms of said mortgage, the said patches or lois of Nakamakaweuweu; but that, on the contrary, it was then and there the intent, purpose and understanding, not only of the defendants here answering, but also of said plaintiffs, that said mortgage should cover, include, affect, and apply to only the lands and premises which were then and
41 there conveyed, and intended to be conveyed, to said defendants David Kawananakoa and Jonah Kalanianaole, in and by the deed last herein mentioned; and that it was not then and there the purpose, intent or understanding of any of the parties to said mortgage that said patches or lois of Nakamakaweuweu should be included within the scope or effect of said mortgage.

5. That the defendants here answering executed the mortgage last aforesaid with the understanding, and in the belief that it covered and affected only those lands and premises which had been intended to be conveyed, and were in fact conveyed by said plaintiffs and said James D. Cockett to said defendants David Kawananakoa and Jonah Kalanianaole; and in particular, that the defendants here answering were, at the time of executing, acknowledging and delivering said mortgage, ignorant of the fact that said mortgage, by its terms, included or could be construed to include said patches or lois of Nakamakaweuweu; and that these defendants here answering, at all times since the execution of said mortgage, until, to-wit, the 14th day of February, 1905, supposed and believed that said mortgage did not in fact include, and could not be construed to include said patches or lois last mentioned. And that these defendants for the first time discovered, and became aware and informed of the fact that said mortgage, purports to included and affect said patches or lois of Nakamakaweuweu, on said 14th day of February, 1905, through the medium of their business agent, John F. Colburn Esq., in conference with A. Lewis Jr. Esq., one of the attorneys of defendant The German Savings & Loan Society herein, examining said mortgage, with reference to a certain mortgage later given by the defendants here answering to said defendant The German Savings & Loan Society, of and upon said last named patches or lois, together with certain other property.

42 And that as result of said discovery by said John F. Colburn, the defendants here answering were at once notified, either in person, or through their agents and attorneys of the facts so discovered as aforesaid.

6. And these defendants allege that, had they understood and known that said mortgage in fact included, or could be construed to include within its terms and effect the said patches or lois of Nakamakaweuweu, they would not, nor would any or either of them have executed or delivered the same to said plaintiffs. And they further allege that *that* the inclusion therein of said patches or lois was the result of mistake, and inadvertence on the part of their conveyancers.

7. That, in the absolute belief that said patches or lois were entirely *un*cumbered, or affected by the mortgage last aforesaid, these defendants, on or about the 31st day of May, 1902, executed, acknowledged and delivered, (in conjunction with Kapiolani Estate, Limited,) a mortgage, for the sum of, to wit, $300,000.00, upon said patches or lois of Nakamakaweuweu, together with other lands and premises situate in Honolulu, and elsewhere within this Territory; and that, at the time of the execution of said last mentioned mortgage, said defendant The German Savings & Loan Society was assured by these defendants, and confidently believed, that it was thereby acquiring a first lien upon said patches or lois, and that the same were unincumbered, and utterly unaffected by the mortgage first hereinabove mentioned.

8. As to the matters alleged in paragraph numbered VII of said bill of complaint, these defendants admit that at the time and times

therein mentioned, defendant Abigail W. Kawananakoa was, and she now is the wife of defendant David Kawananakoa; and that defendant Elizabeth K. Kalanianaole then was, and now is the wife of defendant Jonah Kalanianaole; and as to all other matters
43 in said paragraph alleged, they neither admit nor deny the same, but leave plaintiffs to their proofs thereof.

9. But these defendants respectively submit that this Honorable Court has not, nor has the Third Judge of this Honorable Court, nor any Judge of this Honorable Court jurisdiction, while sitting at Chambers, to take cognizance of, or hear, or determine the cause of action, if any there be, set forth in said bill of complaint.

10. And these defendants further allege and submit that there is now a defect of parties to this suit, which said defect is well known to said defendants, and that said defect consists in this, to wit; that these defendants heretofore, to wit, on or about the 10th day of September, 1903, sold and conveyed to one Samuel M. Damon certain portion of the land and premises mentioned in said bill of complaint, and in the Exhibits and Schedules thereto annexed, and which is and are therein alleged to be covered and affected by the mortgage in said bill of complaint recited, a copy of said last mentioned conveyance being annexed to defendants' said plea in this action, now on file herein. That thereafter, to-wit, on the 7th day of November, 1903, said Samuel M. Damon executed and delivered to the Territory of Hawaii, a certain deed of conveyance, wherein and whereby he, the said Samuel M. Damon did convey to said Territory of Hawaii the land and premises described and conveyed in said last mentioned deed; and that said conveyed land and premises, (to-wit, certain portions of the lands affected and covered by the mortgage recited in said Bill of Complaint) are now held and owned by the Territory of Hawaii, and have been and are incorporated in certain of the public highways of the City of Honolulu.

44 11. That on or about the 20th day of January, 1905, all and singular the right, title and interest of said defendant Jonah Kalanianaole in and to the lands mentioned in, and affected by the mortgage herein referred to, was and were sold at public auction in the City of Honolulu, under Judicial process issued from the District Court in and for the District of Honolulu, Island of Oahu; and that at and upon said sale, one Adrian M. Keoho became the purchaser of all and singular the right, title and interest therein of said defendant Jonah Kalanianaole; and that in pursuance of said sale and purchase there was executed and delivered to him, the said Adrian M. Keoho, by the High Sheriff of the Territory of Hawaii, a deed of conveyance of all and singular the right, title and interest so sold and purchased as aforesaid; and that he, the said Adrian M. Keoho has ever since been, and now is the legal owner in fee simple of all and singular the right title and claim interest in said lands and premises theretofore owned and held by said defendant Jonah Kalanianaole; and that he, the said Adrian M. Keoho has ever since been, and now is the owned and holder of all and singular the equity of redemption in and pertaining to said property, which, before the execution of said

last mentioned deed, was owned by and pertained to said defendant Jonah Kalanianaole.

12. And these defendants allege and submit that said Territory of Hawaii, and said Adrian M. Keoho, or (and) any and all other person or persons, if any, by whom the land and premises, or any part or portion thereof so sold, and conveyed as aforesaid, to-wit, as set forth in paragraphs 10 and 11 of this answer, is and are now held and that the question between the plaintiffs and these defendants in the premises cannot be fully and fairly adjudicated without
45 making the present owner and owners of all and singular the lands and interests so conveyed as set forth in said paragraphs 10 and 11 hereof, parties to this suit.

13. And these defendants further submit and allege that it would be inequitable to pronounce a decree in this cause wherein or whereby said lands and premises known as the patches or lois of Nakamakaweuweu should be in anywise subjected to sequestration or sale under the terms of the mortgage herein aforesaid, or for the purpose of answering any obligation of said mortgage; and defendants further submit that, in the event that the Court shall find it consistent with the principles and practice of equity to grant a decree of foreclosure, as prayed in said bill of complaint, as against any land or premises whatsoever, then the said patches or lois of Nakamakaweuweu as the same are described by metes and bounds in said Exhibit "A," hereto attached, should be, by such decree excluded, and exempted from such sale, and further that such decree should declare and adjudge that said patches or lois were not intended, by the parties to said mortgage, to be included within the scope and effect thereof, and that the inclusion thereof within the description of the premises thereby mortgaged was the result of inadvertence and mistake on the part of the conveyancers of the defendants here answering, and that said mortgage should be reformed so as to exclude said patches and lois, or in the alternative, should be so construed as to exclude the same, without such formal reformation.

Wherefore these defendants further submit that no decree should pass against them in the premises, for the foreclosure of said mortgage, or for the sale of the premises, or any portion of the premises in said bill of complaint alleged to be so mortgaged as aforesaid, unless, nor until all and singular the parties in anywise materi-
46 ally interested in said premises, or any thereof, be brought before the Court, to the end that all equities may be settled and adjusted herein.

And wherefore these defendants further pray that if the said plaintiffs shall refuse or decline to make such parties in interest parties to this action, said bill of complaint should be dismissed.

Dated this 15th day of February, 1905.

DAVID KAWANANAKOA,
JONAH KALANIANAOLE,
ABIGAIL W. KAWANANAKOA,
ELIZABETH K. KALANIANAOLE,
Defendants,

(Signed) By C. W. ASHFORD, *Their Attorney.*

TERRITORY OF HAWAII, *Island of Oahu, ss:*

John F. Colburn having been duly sworn, deposes and says: That he is, and at all times during more than three years last past, has been the business agent of the above named defendants David Kawananakoa and Jonah Kalanianaole at and in the City of Honolulu. That deponent has read the foregoing answer of said defendants and their respective wives, to the bill of complaint in this cause, and knows the contents of said answer. That he is, and at all times mentioned in said answer was and has been familiar with the facts therein set forth, in a greater degree than either of said defendants. That as such business agent as aforesaid, he had charge of the preparation of the instruments of conveyance and mortgage in said answer mentioned and referred to, and that the matters alleged as facts in said answer are true of his own knowledge; except those matters which are therein alleged upon information, advice or belief, and as to those matters, he believes them to be true.

(Signed) JOHN F. COLBURN.

Sworn to before me this 16 day of February, 1905.

(Signed) W. S. EDINGS,
[SEAL.] *Notary Public, First Judicial Circuit.*

47 EXHIBIT A.

All that portion of Royal Patent No. 4371, L. C. A. 7260, to B. Namakeha, at Kaalaa, Pauoa, Honolulu, Oahu, bounded and described as follows:—

Beginning at the West corner of this land on Pauoa Road, the same being the North corner of L. C. A. 5957 B. Apana 3 to Kaholoau, and running by true Meridian:

S. 84 50′ E. 107.4 feet along Pauoa *Roda;*
S. 88 40′ E. 54.0 feet along same;
N. 88 30′ E. 80.5 feet along same;
S. 24 45′ E. 52.0 feet along same;
N. 54 20′ W. 13.0 feet along same;
S. 00 55′ E. 222.3 feet along same;
S. 5 00′ E. 103.0 feet along same;
S. 55 18′ W. 23.0 feet along L. C. A. 236 to Kahole;
N. 5 05′ W. 36.0 feet along remainder of this land;
S. 84 12′ W. 180.8 feet along stone wall;
N. 12 07′ E. 183.0 feet along L. C. A. 5957 B. Apana 4 to Kaholoau;
N. 70 35′ W. 125.0 feet along same;
N. 9 20′ E. 171.5 feet along L. C. A. 5957 B. Apana 3 to Kaholoau to the initial point, and containing an area of 1.95/100 Acres.

Endorsed: Equity #1431. R. 1/194. Circuit Court First Circuit. At Chambers. In Equity. Ellen Albertina Polyblank alias Sister

Albertina, Trustee *vs.* David Kawananakoa, *et al.* Amended Answer of Defendants David Kawananakoa, Jonah Kalanianaole, Abigail W. Kawananakoa & Elizabeth K. Kalanianaole. Original. Filed February 16th, 1905, at 3:50 o'clock P. M. M. T. Simonton, Clerk. C. W. Ashford Att'y for above named def'ts.

48 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii, at Chambers. In Equity.

ELLEN ALBERTINA POLYBLANK, Otherwise Known as SISTER ALBERTINA, Trustee for Stella Keomailani Cockett, and STELLA K. COCKETT, Sole Beneficiary under said Trust, Complainants,

vs.

DAVID KAWANANAKOA, JONAH KALANIANAOLE, ABIGAIL W. KAWANANAKOA, ELIZABETH K. KALANIANAOLE, THE GERMAN SAVINGS AND LOAN SOCIETY, a Corporation, and THE TERRITORY OF HAWAII, Respondents.

Decree of Foreclosure.

This cause came on regularly to be heard before the undersigned Third Judge of the Circuit Court of the First Circuit, at Chambers, on the 3rd day of May, A. D. 1905, E. A. Douthitt, Esq. appearing for complainants and C. W. Ashford, Esq. appearing for the respondents, David Kawananakoa, Jonah Kalanianaole, Abigail W. Kawananakoa and Elizabeth K. Kalanianaole, and
W. J. R. Messrs. Smith & Lewis appearing for the German Savings & Loan Society, a corporation, the Territory of Hawaii not appearing, the complainants herein having discontinued and dismissed their bill of complaints as to said Territory of Hawaii.

The Court having heard all of the evidence and proofs produced herein and duly considered the same, and being fully advised in the premises, and it appearing therefrom to the satisfaction of the Court—

1. That the above named respondents have been duly and regularly summoned to appear and answer the complainants' bill
49 of complaint herein;

2. That there is now due and owing to the complainants herein, from the respondents, David Kawananakoa and Jonah Kalanianole, upon the promissory note and mortgage sued upon in this action, the sum of Eight Thousand Dollars, together with interest thereon at the rate of seven per cent. per annum, from the 25th day of June, A. D. 1903, and that the respondents, David Kawananakoa and Jonah Kalanianaole are personally liable for the whole amount thereof;

3. That there is also due the complainants from said respondent-David Kawananakoa and Jonah Kalanianaole the sum
W. J. R. of Forty-four and 50/100 ($44.50) Dollars as and for costs and expenses incurred by complainants herein;

4. That the said sums of Eight Thousand Dollars together with

interest thereon at the rate of seven per cent. per annum from the 25th day of June A. D. 1903, amounting to $9042.10
W. J. R. *Dollars*, together constitute a valid first lien upon the land and premises mentioned in complainants' bill of complaint, and hereinafter particularly set forth and described, and is secured by the mortgage mentioned and set forth in said complaint;

5. That each and all of the terms and conditions of said mortgage have been broken by said respondents David Kawananakoa and Jonah Kalanianaole and that complainants are entitled to have said mortgage enforced and foreclosed and the lands and premises, hereinafter set forth and described sold in the manner prescribed by law, and the proceeds arising from such sale applied to and upon the payment of said sum of money so due as aforesaid;

6. That each and all of the allegations and averments in complainants' bill of complaint contained are true and correct:

7. That heretofore upon application duly and regularly
50 made in that behalf, complainants herein discontinued and dismissed their bill of complaint herein as to the respondent, the Territory of Hawaii, originally made a party herein by said complainants, and said Territory of Hawaii is hereby relieved, released and discharged from the operation, effect and force of this decree.

8. That the respondents Abigail W. Kawananakoa and Elizabeth K. Kalanianaole were on the date said note and mortgage were executed as aforesaid, and still are the wives respectively of the respondents David Kawananakoa and Jonah Kalanianaole, and, as such wives as aforesaid, joined with said respondents David Kawananakoa and Jonah Kalanianaole in the execution of said mortgage in token of their consent thereto and in release and bar of their dower rights in and to the property hereinafter described.

9. That the said note and mortgage executed by said respondents David Kawananakoa and Jonah Kalanianaole in favor of the complainants Ellen Albertina Polyblank, otherwise known as Sister Albertina, Trustee for Stella K. Cockett, for said sum of Eight Thousand Dollars hereinabove set forth, was for a portion of the purchase price of the lands and premises hereinafter set forth and described;

10. That on the 8th day of May, 1902, when said note and mortgage were executed by the respondents David Kawananakoa and Jonah Kalanianaole in favor of the said Ellen Albertina Polyblank, otherwise known as Sister Albertina, Trustee for Stella Keomailani Cockett, there was no mistake or misunderstanding between the parties to said mortgage sued upon herein, as to the exact property conveyed by the said respondents David Kawananakoa
W. J. R. and Jonah Kalanianaole by way of mortgage to said Ellen Albertina Polyblank otherwise known as Sister Albertina Trustee for Stella K. Cockett; but on the contrary the Court finds that the respondents David Kawananakoa and Jonah Kalanianaole did then and there on said 8th day of May,
51 A. D. 1902 execute and deliver to the said Ellen Albertina Polyblank otherwise known as Sister Albertina as Trustee for

Stella K. Cockett, all the lands and premises as set forth in complainants' bill of complaint herein, without any exception or reservation whatsoever of any lands or portions of lands contained therein and especially without any exception or reservation whatsoever concerning the so-called patches or lois or Nakamakaweuweu as more particularly appears in respondents' answer herein now on file; and in this behalf I do further find that the respondents David Kawananakoa and Jonah Kalanianaole did make and execute said note and mortgage to said Ellen Albertina Polyblank otherwise known as Sister Albertina, as Trustee for Stella K. Cockett, then and there knowing and fuly understanding that the same was for the lands and premises contained in plaintiffs' bill of complaint herein without any exception, reservation or limitation whatsoever;

11. That the respondent the German Saving & Loan Society, a corporation subsequent to the execution and delivery of the note and mortgage set forth and described in complainants' bill of complaint herein, became, was and still is, a secondary incumbrancer upon a portion of the land and premises hereinafter described, but the lien of said the German Savings & Loan Society, a corporation was and is subordinate and subject to the lien of complainants herein upon said premises hereafter described; and whereas the said respondent is a secondary incumbrancer upon a portion of the land hereinafter set forth and described on page 10 hereof, to the extent of one and 95/100 acres the description thereof being as follows:

52 "All that portion of Royal Patent No. 4371, L. C. A. 7260, to B. Namakeha, at Kaalaa, Pauoa, Honolulu, Oahu, bounded and described as follows:

Beginning at the West corner of this land on Pauoa Road, the same being the North corner of L. C. A. 5957 B. Apana 3 to Kaholoau, and running by true meridian:

S. 84 50′ E. 107.4 feet along Pauoa Road;
S. 88 40′ E. 54.0 feet along same;
N. 88 30′ E. 80.5 feet alone same;
S. 24 45′ E. 52.0 feet along same;
N. 54 20′ W. 13.0 feet along same;
S. 00 55′ E. 222.3 feet along same;
S. 5 00′ E. 103.0 feet along same;
S. 55 18′ W. 23.0 feet along L. C. A. 236 to Kaholo;
N. 5 05′ W. 36.0 feet along remainder of this land;
S. 84 12′ W. 180.8 feet along stone wall;
N. 12 07′ E. 183.0 feet along L. C. A. 5957 B. Apana 4 to Kaholoau;
N. 70 35′ W. 125.0 feet along same;
N. 9 20′ E. 171.5 feet along L. C. A. 5957 B. Apana 3 to Kaholoau to the initial point, and containing an area of 1.95/100 acres."

W. J. R. Now therefore it is ordered, adjudged and decreed that the aforesaid land and property last hereinabove described under second mortgage to said respondent, The German Savings & Loan Society, a corporation shall not be sold

unless the amount received and obtained from the sale of the balance of the land and premises hereinafter described, ex-
W. J. R. clusive of that portion of the same last hereinabove described, shall be insufficient and inadequate to satisfy the amount of the judgment herein; and in case the amount realized or obtained from such sale as aforesaid shall be in-
53 sufficient to satisfy the judgment herein, then the Commissioner herein is hereby ordered to expose and offer for sale at public auction, upon the same terms hereinafter set forth, the said land and premises hereinabove described, under second mortgage to said respondent The German Savings & Loan Society, a corporation to satisfy the judgment herein.

Provided however, that said respondent shall give and furnish to the complainants herein of their attorneys a good, accurate and sufficient description of the lands and premises to be sold first by the Commissioner herein after eliminating and excluding the lands and premises under second mortgage as aforesaid to said
W. J. R. The German Savings & Loan Society, a corporation, as hereinabove described, at the expense of said respondent, the German Savings & Loan Society, a corporation.

It is ordered, adjudged and decreed that M. T. Simonton, Esq. be and is hereby appointed a Commissioner to sell the land and premises hereinafter set forth, and

It is further ordered, that before entering upon his duties as such Commissioner, he shall take the oath and give a bond in the sum of One Thousand Dollars for the faithful discharge of his duties as such Commissioner;

And it is further ordered that whatever sum or sums of money may be derived by said Commissioner as aforesaid arising out of the sale of the land and premises hereinafter set forth and described shall be by the said Commissioner turned over and delivered to Henry Smith, Esq. Clerk of the Judiciary Department of the Territory of Hawaii or to his successor or successors in office, subject to the order of this Court.

It is further ordered, adjudged and decreed, that all and singular the mortgaged premises hereinafter mentioned and described or so much thereof as may be sufficient to raise the amount due, to
54 the complainants herein for the principal and interest and costs of this suit and expenses of sale be sold at public auction by the said M. T. Simonton, Esq. Commissioner herein, upon notice of the same thereof being given, by said Commissioner, by publication in the Hawaiian Star, a newspaper of general circulation printed and published in Honolulu, Island of Oahu, Territory of Hawaii, for at least ten days from the date of the first publication thereof; and that the purchaser or purchasers at said sale pay to said Commissioner upon the fall of the hammer ten per cent. of the price bid the balance to be paid upon the delivery of the deed. And that the said Commissioner, upon the sale of the land and premises hereinafter set forth and described, and upon the report being made
W. J. R. to this Court of his proceedings herein, and upon the confirmation thereof, be and is hereby authorized and

empowered to execute a deed to the purchaser or purchasers thereof free and clear of all incumbrances or liens thereon.

It is further ordered, adjudged and decreed that the said M. T. Simonton, Commissioner herein, out of the proceeds of such sale retain his fees, and commissions on said sale and pay to Henry Smith, Esq. Clerk of the Judiciary Department of the Territory of Hawaii or to his successor or successors in office subject to the order of this Court, out of said proceeds, the sum of Forty-
W. J. R. four and 50/100 ($44.50) Dollars, costs of this suit, also the further sum of Eight Thousand Dollars and interest thereon at the rate of seven per cent. per annum from the 25th day of June, 1903, up to and including the date of the sale of the land and premises under this decree, to be sold as hereinabove set forth, or so much thereof as the said proceeds of sale will pay of the same and any overplus after the principal of the note sued upon herein together with all costs and interests herein shall have
55 been deducted shall be turned over and delivered to the respondents David Kawananakoa and Jonah Kalanianaole.

And it is further Ordered, Adjudged and Decreed, that the respondents David Kawananakoa and Jonah Kalanianaole, Abigail W. Kawananakoa, Elizabeth K. Kalanianaole and the German Savings & Loan Society, a corporation and all persons claiming or to claim from or under them, and all persons having liens or lien subsequent to said mortgage by judgment or decree upon the land and premises hereinafter described, and their personal representative, and all persons having any lien or claim by or under such subsequent judgment or decree and their heirs or personal representatives, and all persons claiming to have acquired any shares or interest in said land or premises be and they are hereby forever barred and foreclosed of and from all claim, right, interest, lien, incumbrance and equity of redemption in and to the said mortgaged premises hereinafter set forth and described and every part and parcel thereof, from and after the delivery of said Commissioner's deed;

And it is further Ordered, Adjudged and Decreed, that complainants herein may become purchasers at such sale of such Commissioner.

And it is further Ordered, Adjudged and Decreed, that the purchaser or purchasers of said mortgaged premises hereinafter described at such sale, be let into immediate possession thereof and that any of the parties to this action who may be in possession of said lands and premises or any portion thereof, and any person who since the commencement of this action has come into possession under them or either of them deliver possession thereof to such purchaser or purchasers on production of the Commissioner's deed for such premises or any part thereof.

56 And it is further Ordered, Adjudged and Decreed that if the moneys arising from the said sales shall be insufficient to pay the amount so found due complainants as above stated, with interest costs, and expenses of sale aforesaid, the Commissioner specify in his report the amount of such deficiency and balance due to com-

W. J. R.

plainants in his said sale, and that on the coming in and filing of said return, the clerk of this Court docket a judgment for such balance against the respondents David Kawananakoa and Jonah Kalanianaole and that the respondents David Kawananakoa and Jonah Kalanianaole pay to the said complainants the amount of such deficiency and judgment, with interest thereon at the rate of six per cent. per annum from the date of said last mentioned return and judgment, and that the complainants have execution therefor.

The land and premises directed to be sold by and under this decree are situate, lying and being at Honolulu, Island of Oahu, Territory of Hawaii, and being more particularly bounded and described as follows, to-wit:

A portion of Kaalaaluna, Honolulu, Kona, Oahu. L. C. Award 7260 to B. Namakeha.

"Beginning on the new South line of Pauoa Road, on the East boundary of L. C. A. 5957 B. to Kaholoau, said point being 193.5 feet from the intersection of the new South line of Pauoa Road and Nuuanu Avenue, as shown on Government Registered Map No. 2004 and running by true Azimuths:

57

1.	270	00′ 30″	441.1	feet	along	new South line of Pauoa Road;
2.	338	48′	241.0	"	"	Ulu's place;
3.	58	10′	216.5	"	"	L. C. A. 85 F. L. and 6059;
4.	56	15′	125.0	"	"	L. C. A. 236;
5.	62	05′	82.6	"	"	same;
6.	74	10′	112.0	"	"	same;
7.	179	28′	9.8	"	"	L. C. A. 11144 B. Ap. 2;
8.	86	50′	52.8	"	"	same;
9.	147	33′	71.3	"	"	same;
10.	45	10′	61.0	"	"	"
11.	138	38′	160.3	"	"	"
12.	45	10′	6.0	"	"	"
13.	154	15′	9.5	"	"	Kaalaaialo;
14.	223	10′	110.5	"	"	"
15.	259	17′	9.7	"	"	"
16.	223	00′	117.5	"	"	"
17.	188	00′	65.0	"	"	"
18.	189	51′	95.2	"	"	L. C. A. 5957 to point of beginning.

Area 5.17 Acres.

together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining.

Dated Honolulu, Oahu, May 4th, 1905.

(Signed) W. J. ROBINSON,
Third Judge, Circuit Court of the First Judicial Circuit, Territory of Hawaii, Sitting at Chambers, in Equity.

Endorsed: E. 1431. R. 1/194. Circuit Court, First Circuit. Territory of Hawaii. At Chambers. In Equity. Ellen Albertina Polyblank, otherwise known as Sister Albertina, Trustee for Stella Keomailani Cockett and Stella K. Cockett, sole beneficiary under said trust, Complainants, *vs.* David Kawananakoa, Jonah Kalanianaole, Abigail W. Kawananakoa, Elizabeth K. Kalanianaole, The German Savings and Loan Society, a corporation and The Territory of Hawaii, Respondents. Decree of Foreclosure. Filed May 5th, 1905 at 10:15 o'clock A. M. M. T. Simonton Clerk.

58 *Extracts from the Minute Book of the Department of the Circuit Court for the First Circuit, Territory of Hawaii, Presided over by the Third Judge Thereof.*

In the cause of:

ELLEN ALBERTINA POLYBLANK ET AL.
vs.
DAVID KAWANANAKOA ET AL.

Bill for Foreclosure of Mortgage.

THURSDAY, *October* 13, 1904.

Present: Honorable W. J. Robinson, Third Judge. M. T. Simonton, Clerk.

Cause on to be heard this day, the motion of plaintiff herein for permission and leave to amend the return of service on the summons herein, heretofore returned and filed in this court, upon the ground that the said return of service is uncertain, ambiguous and unintelligible for that it does not appear and it cannot be ascertained therefrom whether the defendants David Kawananakoa and Abigail W. Kawananakoa were served by Albert McGurn, Deputy Sheriff of the Island of Oahu, Territory of Hawaii, or whether said summons was served by W. M. S. Lindsey, Deputy Sheriff of the District of Waimea, Island of Hawaii in said Territory; E. A. Douthitt, Esq., appearing as attorney for plaintiff.

The Court grants the motion.

59 Title of Court and Cause.

MONDAY, *November* 14, 1904.

By consent of counsel and order of the Court, hearing of respondents' Demurrers to complainants' complaint herein, set for 9 o'clock a. m. this day, is continued until Thursday, November 17, A. D. 1904, at 9 o'clock a. m.

Title of Court and Cause.

THURSDAY, *November* 17, 1904.

Cause on to be heard at 9 o'clock a. m. this day, the demurrers of respondents David Kawananakoa, Jonah Kalanianaole, Abigail W. Kawananako and Elizabeth K. Kalanianaole, to complainants' bill of complaint herein; C. W. Ashford Esq. appearing as attorney for respondents and E. A. Douthitt, Esq. appearing for complainants. Counsel argue.

Mr. Douthitt moves to amend complaint by adding the name of Stella Keomailani Cockett, sole beneficiary under said trust deed, as party plaintiff; also that the bill be further amended by striking out the words "of San Francisco" (wherever same occur throughout the bill) after the words "German Savings and Loan Society."

The motion to amend is granted, and the clerk is directed to make the amendments noted.

The Court then orders.

"The demurrers may stand submitted on briefs to be filed in or before Monday, November 21, A. D. 1904, at 4 o'clock p. m."

L. J. Warren Esq. of counsel for respondent German Savings and Loan Society, now appears in court, and asks that the de-
60 murrer of said respondent be considered submitted.

It is so ordered.

Title of Court and Cause.

WEDNESDAY, *November* 23, 1904.

The Court having heretofore, to wit, on Thursday, November 17 A. D. 1904, taken respondents' demurrers to complainants' bill of complaint under advisement, this day render its decision herein, in writing, as follows:

"It is ordered that the several demurrers of the respondents David Kawananakoa, Jonah Kalanianaole, Abigail W. Kawananakoa, and Elizabeth K. Kalanianaole and The German Savings and Loan Society, a corporation, be and the same are and each of them is hereby overruled, with leave to answer with- five (5) days."

C. W. Ashford Esq. counsel for respondents David Kawananakoa Jonah Kalanianaole, Abigail W. Kawananakoa and Elizabeth K. Kalanianole, notes an exception to the order overruling the demurrer.

Title of Court and Cause.

MONDAY, *February* 6, 1905.

The hearing and trial of the above entitled cause having been set for 9 o'clock a. m. this day, E. A. Douthitt Esq. appears as attorney for complainants; C. W. Ashford Esq. appears as attorney for respondents David Kawananakoa, Jonah Kalanianaole, Abigail W. Kawananakoa and Elizabeth K. Kalanianole and L. J. Warren Esq.

as attorney for respondent The German Savings and Loan Society.

61 Mr. Ashford objects to the hearing and trial proceeding at this time on the ground that the plea to the jurisdiction of this Court heretofore filed by respondents David Kawananakoa, Jonah Kalanianaole, Abigail W. Kawananakoa and Elizabeth K. Kalanianaole, has not as yet been disposed of.

Mr. Ashford reads and argues on plea of respondents.

Mr. Douthitt argues.

The Court overrules the plea, with leave to answer within two days.

Mr. Ashford notes an exception.

Title of Court and Cause.

SATURDAY, *February* 11, 1905.

The hearing and trial of the above entitled cause having been set for 9 o'clock a. m. this day, E. A. Douthitt Esq. appears as attorney for complainants, and A. Lewis Jr. Esq. appears as attorney for respondent The German Savings and Loan Society.

W. S. Edings representing C. W. Ashford Esq. attorney for respondents David Kawananakoa, Jonah Kalanianaole, Abigail W. Kawananakoa and Elizabeth K. Kalanianaole, announces in open court that Mr. Ashford is now in Hilo, and therefore ask that the hearing be deferred until Mr. Ashford's return, Mr. Edings stating that he will return this afternoon.

The court therefore continues the cause until Tuesday, February 14, A. D. 1905 at 4:30 o'clock p. m.

Title of Court and Cause.

The hearing of the above entitled cause having been set

62 for 4:30 o'clock p. m. E. A. Douthitt Esq. appears as attorney for complainants, C. W. Ashford Esq. appears as attorney for respondents David Kawananakoa, Jonah Kalanianaole, Abigail W. Kawananakoa and Elizabeth K. Kalanianaole, and A. Lewis Jr. Esq. appears as attorney for respondent The German Savings and Loan Society.

Mr. Ashford asks for 48 hours' time in which to amend answers of respondents David Kawananakoa, Jonah Kalanianaole, Abigail W. Kawananakoa and Elizabeth K. Kalanianaole, or to file a cross-bill, on the ground that, through inadvertence there was included certain property in the mortgage that should not have been so included.

Mr. Douthitt objects to any further continuance.

Counsel argue.

Mr. Lewis asks leave to amend answer of respondent The German Savings and Loan Society.

Thereupon the Court orders:

"The motions are granted, and each and all respondents are allowed up to and including Thursday, February 16, A. D. 1905, in

which to amend their answers or to take such further steps or file such further pleadings as they may be advised."

Title of Court and Cause.

FRIDAY, *April* 14, 1905.

This cause came on regularly for hearing and trial at 1.30 o'clock p. m. E. A. Douthitt Esq. appears as attorney for petitioners; C. W. Ashford Esq. appearing as attorney for respondents David Kawananakoa Jonah Kalanianaole, Abigail W. Kawananakoa and Elizabeth K. Kalanianaole and A. Lewis Jr. Esq. appearing as attorney for The German Savings and Loan Society.

63 Mr. Douthitt offers in evidence a mortgage made and entered into on the 8th day of May A. D. 1902, by and between David Kawananakoa and Jonah K. Kalanianaole parties of the first part, and Ellen Albertina Polyblank, Trustee, party of the second part; recorded in the office of the Registrar of Conveyances in Liber 232 on pages 422, 423, 424.

Received in evidence and marked Complainants' Exhibit "A."

Ellen Albertina Polyblank is called, sworn and examined as a witness on behalf of complainants.

Mr. Douthitt offers in evidence a promissory note for $8000.00 dated May 8, 1902, payable to Ellen Albertina Polyblank Trustee, and signed by David Kawananakoa and Jonah K. Kalanianaole.

Received in evidence and marked complainants' Exhibit "B."

Edgar Henriques and M. D. Monsarrat are called, sworn and examined as witnesses on behalf of complainants.

Mr. Douthitt offers in evidence a written "Description of a portion of Kaalualoma, L. C. A. 7260, to B. Namakeha," made and signed by M. D. Monsarrat and Olaf L. Sorenson, surveyors.

Received in evidence and marked complainants' Exhibit "C."

Mr. Douthitt offers in evidence a map made by M. D. Monsarrat, Surveyor.

Received in evidence and marked complainants' Exhibit "D."

Mr. Ashford moves that Exhibits "C" and "D" be stricken from the files.

The court denies the motion.

Mr. Ashford notes an exception.

Complainants here rest.

John F. Colburn is called, sworn and examined as a witness on behalf of respondents.

At 4:30 o'clock p. m. the court continues further hearing herein until Thursday April 27, A. D. 1905, at 10 o'clock a. m.

64 Title of Court and Cause.

APRIL 27, 1905.

Further hearing and trial of the above entitled cause, set for 10 o'clock a. m. this day, is, by consent of counsel and order of the Court, continued until Saturday, April 29, A. D. 1905, at 9:30 o'clock a. m.

Title of Court and Cause.

SATURDAY, *April* 29, 1905.

Of the Court's own motion, the further hearing and trial of the above entitled cause, set for 9:30 o'clock a. m. this day, is continued until Wednesday, May 3, A. D. 1905, at 10 o'clock a. m.

Title of Court and Cause.

MAY 3, 1905.

This cause came on for further trial at 10 o'clock a. m. E. A. Douthitt Esq. appearing as attorney for complainants; C. W. Ashford Esq. appearing as attorney for respondents David Kawananakoa, Jonah Kalanianaole, Abigail W. Kawananakoa and Elizabeth K. Kalanianaole, and A. Lewis Jr. Esq., appearing as attorney for respondent The German Savings and Loan Society.

John F. Colburn is recalled as a witness on behalf of respondents.

Direct examination by Mr. Ashford.

Mr. Ashford offers in evidence a map of premises in dispute.

Received in evidence and marked respondents' Exhibit "1."

65 Mr. Ashford offers in evidence record in case of Sister Albertina, Trustee *vs.* Kapiolani Estate, Limited, (Law Division, No. 5035).

Received in evidence and marked respondents' Exhibit "2."

Cross examination by Mr. Douthitt.

Mr. Douthitt offers in evidence a letter, dated April 26, 1904, addressed to Sister Albertina, Trustee, and signed John F. Colburn.

Received in evidence and marked complainants' Exhibit "E."

Re-direct examination by Mr. Ashford.

Mr. Ashford offers in evidence a deed, executed by William Henry, High Sheriff, to Adrian M. Keoho, dated January 20, 1905.

Mr. Douthitt objects to offer.

The Court sustains the objection.

Mr. Ashford notes an exception, and moves that the deed be marked, for identification, respondents' Exhibit "3."

Exception allowed, and motion granted.

At 12:10 o'clock p. m. the court continues further hearing and trial herein until 2 o'clock p. m. to which time Court takes a recess.

Afternoon Session.

Title of Court and Cause.

This cause came on for further hearing and trial at 2 o'clock p. m. E. A. Douthitt Esq. appearing as attorney for complainants; C. W. Ashford Esq. appearing as attorney for David Kawananakoa, Jonah Kalanianaole, Abigail W. Kawananakoa and Elizabeth K. Kalanianaole, and A. Lewis Jr. Esq. appearing as attorney for respondent The German Savings and Loan Society.

Mr. Ashford offers in evidence record and files in case of W. W. Dimond & Company, Limited, *vs.* Jonah K. Kalanianaole, (Law Division, No. 5718).

Mr. Douthitt objects to offer.

66 The Court sustains the objection.

Respondents here rest.

Charles F. Peterson is called, sworn and examined as a witness in rebuttal by complainants.

Direct examination by Mr. Douthitt.

Cross examination by Mr. Ashford.

Complainants rest.

No sur-rebuttal.

Mr. Ashford and Mr. Lewis argue.

Thereupon the Court orders:

"The affirmative relief prayed for by the respondents David Kawananakoa and Jonah K. Kalanianaole is denied; the motion of respondent The German Savings and Loan Society that the property in which it holds a mortgage be sold last is granted, provided said respondent The German Savings and Loan Society furnish a description of premises after elimination."

It is further ordered that the prayer of the bill be and the same is hereby granted.

M. T. Simonton is appointed Commissioner to sell the property with bond in the sum of $1000.00. Sale to be for cash; 10% on fall of the hammer; balance upon execution and delivery of deeds to purchaser or purchasers. Notice of time and place of holding sale to be had by publication in the Hawaiian Star for ten (10) days prior to date of sale.

Mr. Ashford gives notice of appeal to the Supreme Court.

67 Title of Court and Cause.

Came on to be heard this day complainants' motion for taxation of costs in the above entitled cause; E. A. Douthitt Esq. appearing as attorney for complainants; and A. Lewis Jr. Esq. appearing as attorney for respondent The German Savings and Loan Society.

Mr. Douthitt presents and reads complainants' bill of costs.

Counsel argues.

Thereupon the Court orders:

"Let complainants' costs be taxed and allowed in the sum of $44.50, eliminating and disallowing the last item of said bill of costs as presented. $40.00 for surveyors' fees."

Mr. Douthitt notes an exception.

Mr. Douthitt thereupon presents proposed decree of foreclosure.

The final decree as presented is signed by the Court.

I, M. T. Simonton, Clerk of the Circuit Court for the First Circuit of the Territory of Hawaii, do hereby certify that the above and foregoing are true extracts from the Minute Book, kept by the Clerk of said Circuit Court, of and concerning the matters coming, and which have come before the Third Judge of said Circuit Court; and I do further certify that the above and foregoing constitute a

full, complete and accurate copy of all and singular the minute orders, and Minute Book entries in and concerning the above entitled cause, of Ellen Albertina Polyblank, *et al. vs.* David Kawananakoa *et al.*, heretofore pending, before said Circuit Court, and the Third Judge thereof, at Chambers in Equity.

Witness my hand and the seal of said Circuit Court at
68 Honolulu, in said Circuit this 2d day of October, 1905.

[SEAL.] (Signed) M. T. SIMONTON, *Clerk.*

Endorsed: In the Supreme Court of the Territory of Hawaii. October Term & Session, 1905. Ellen Albertina Polyblank *et al.*, Appellees, *vs.* David Kawananakoa *et al.*, Appellants. Certified copy of Minute Orders. Filed October 2d, 1905 at 2 o'clock P. M. M. T. Simonton, Clerk. Clarence W. Ashford, Attorney for Def't-Appellants.

69 In the Circuit Court for the First Circuit, Territory of Hawaii, at Chambers. In Equity.

ELLEN ALBERTINA POLYBLANK, Otherwise Known as SISTER ALBERTINA, Trustee for Stella Keomailani Cockett, and STELLA K. COCKETT, Sole Beneficiary under said Trust, Complainants,

vs.

DAVID KAWANANAKOA, JONAH KALANIANAOLE, ABIGAIL W. KAWANANAKOA, ELIZABETH K. KALANIANAOLE, THE GERMAN SAVINGS & LOAN SOCIETY, a Corporation, and THE TERRITORY OF HAWAII, Respondents.

Notice of Appeal.

The defendants David Kawananakoa, Jonah Kalanianaole, Abigail W. Kawananakoa and Elizabeth K. Kalanianaole, in the above entitled cause hereby give notice that they will appeal, and they do hereby appeal to the Supreme Court of the Territory of Hawaii, from the Decree signed and filed herein on, to-wit, the 5th day of May, 1905.

Dated this 8th day of May, 1905.

(Signed) C. W. ASHFORD,
Attorney for said Defendants.

Endorsed: E. 1431. Circuit Court, First Circuit. Territory of Hawaii. At Chambers. In Equity. Ellen Albertina Polyblank, otherwise known as Sister Albertina, Trustee etc. *vs.* David Kawananakoa, *et al.* Notice of Appeal. Indexed J. A. T. Clerk. E. 1/194 Filed May 10, 1905 at 10:40 a. m. J. A. Thompson, Clerk. C. W. Ashford, Attorney for said Defendants.

70 In the Supreme Court of the Territory of Hawaii, October Term, 1905.

ELLEN ALBERTINA POLYBLANK, Otherwise Known as SISTER ALBERTINA, Trustee for Stella Keomailani Cockett, and STELLA K. COCKETT, Sole Beneficiary under said Trust,

v.

DAVID KAWANANAKOA, JONAH KALANIANAOLE, ABIGAIL W. KAWANANAKOA, ELIZABETH K. KALANIANAOLE, and THE GERMAN SAVINGS AND LOAN SOCIETY, a Corporation.

Appeal from Circuit Judge, First Circuit.

Argued October 4, 1905. Decided October 23, 1905.

Frear, C. J., Hartwell and Wilder, JJ.

Mortgage foreclosure—parties—deficiency judgment.—A suit to foreclose a mortgage may be brought against the mortgagors without joining a subsequent purchaser of a portion of the mortgaged premises, and a deficiency judgment against the mortgagors may be authorized without first foreclosing the interest of the subsequent purchaser when that subsequent purchaser is the Territory of Hawaii.

71 Opinion of the Court by WILDER, *J.*:

This is an appeal from a decree of foreclosure and sale under a mortgage from D. Kawananakoa and J. Kalanianaole to Sister Albertina, trustee for Stella K. Cockett. The suit was brought by the mortgagee against the mortgagors and their wives, the German Savings & Loan Society, a junior mortgagee of a portion of the mortgaged premises, and the Territory of Hawaii, and later discontinued as to the Territory. After the execution of the mortgage the mortgagors conveyed a portion of the mortgaged premises to S. M. Damon, who, in turn, conveyed it to the Territory. The decree authorized the entry of a deficiency judgment against the mortgagors in case the proceeds from a sale of the mortgaged premises should be found to be insufficient to pay the amount due.

The first claim of appellants is that the decree should be reversed because a purchaser, subsequent to the mortgage, of a portion of the mortgaged premises was not made a party to the suit. It is clear that, unless joined as a party, the rights of a subsequent purchaser cannot be affected or concluded by the decree. The mortgagors have no reason to complain because their interest in the mortgaged premises is foreclosed without joining the subsequent purchaser of a portion. It follows that the foreclosure is good as far as it goes. See *Childs v. Childs*, 10 O. St. 339; *Landon v. Townshend*, 112 N. Y. 93; 2 Jones on Mortgages, Sec. 1395; *Kay v. Whittaker*, 44 N. Y. 565; *Merriman v. Hyde*, 2 N. W. 218.

It is further claimed that no deficiency judgment should be entered against the mortgagors until all of the mortgaged premises are sold. All that the mortgagors can claim is that the mortgagee should foreclose on and have sold all of the mortgaged property that is possible, that is, that she should foreclose all that the law allows her to foreclose, before entering up a deficiency judg-
72 ment. In this case all of the mortgaged property is to be sold except that part which is now held by the Territory. The interest of the Territory in that portion cannot be foreclosed and sold without joining the Territory as a party defendant, and that cannot be done. See chapter 129 of the Revised Laws. The mortgagee has done all that she can, and it would be inequitable that she should suffer throught no fault of her own, particularly when the mortgagors have received a substantial befefit by reason of the transfer.

Clark *v.* Simmons, 8 N. Y. Supp. 74, cited in 2 Jones, Mortgages, Sec. 1709 B, is in point. In that case it was held that where a mortgage on land partly in New York and partly in another state was foreclosed in New York as to the land therein and that land was sold plaintiff could have a judgment for a deficiency without foreclosing as to the land in the other state as the New York courts could not order a sale of that land. The California cases cited by appellants on this question are not in point, as they are controlled by a statute which has no force in this Territory.

Appellants also claim that the decree, in describing the land to be sold, is erroneous in that is does not follow the description in the mortgage. The circuit judge found, as a matter of fact, against this contention. So far as appears on this appeal we cannot see that the circuit judge erred, and therefore this objection must be overruled.

The decree appealed from is affirmed.

(Signed) W. F. FREAR.
(Signed) ALFRED S. HARTWELL.
(Signed) A. A. WILDER.

E. A. Douthitt for plaintiffs.
C. W. Ashford for defendants.

Endorsed: Supreme Court Territory of Hawaii. E. A. Polyblank *et al. vs.* D. Kawananakoa. Decision. Filed Oct. 23, 1905. George Lucas, Clerk.

73 In the Supreme Court of the Territory of Hawaii.

DAVID KAWANANAKOA, JONAH KALANIANAOLE, ABIGAIL W. KAWANANAKOA, and ELIZABETH K. KALANIANAOLE, Appellants,

vs.

ELLEN ALBERTINA POLYBLANK, Otherwise Known as SISTER ALBERTINA, Trustee for Stella Keomailani Cockett, and STELLA K. COCKETT, Sole Beneficiary under said Trust, Appellees.

Certificate of Clerk to Transcript of Record.

HONOLULU, OAHU, *Territory of Hawaii, ss:*

I, Henry Smith, Clerk of the Supreme Court of the Territory of Hawaii, do hereby certify the above and foregoing to be a full, true and correct transcript of the record and proceedings had in the said Supreme Court of the Territory of Hawaii in the case entitled in said Court, "Ellen Albertina Polyblank, otherwise known as Sister Albertina, Trustee for Stella Keomailani Cockett and Stella K. Cockett, sole beneficiary under said Trust, *vs.* David Kawananakoa, Jonah Kalanianaole, Abigail W. Kawananakoa and Elizabeth K. Kalanianaole, and The German Savings & Loan Society, a corporation," as required by the præcipe of the attorneys of appellants attached hereto.

In testimony whereof I have hereunto set my hand and caused the seal of the said Supreme Court of the Territory of Hawaii, to be hereunto affixed at Honolulu in said Territory this 23rd day of February A. D. 1906.

[Seal Supreme Court, Territory of Hawaii.]

HENRY SMITH,

Clerk of the Supreme Court of the Territory of Hawaii.

74 In the Supreme Court of the Territory of Hawaii.

DAVID KAWANANAKOA, JONAH KALANIANAOLE, ABIGAIL W. KAWANANAKOA, and ELIZABETH K. KALANIANAOLE, Appellants,

vs.

ELLEN ALBERTINA POLYBLANK, Otherwise Known as SISTER ALBERTINA, Trustee for Stella Keomailani Cockett, and STELLA K. COCKETT, Sole Beneficiary under said Trust, Appellees.

Petition for Appeal.

The above named appellants, David Kawananakoa, Jonah Kalanianaole, Abigail W. Kawananakoa and Elizabeth K. Kalanianaole respectfully show that a cause is now pending in the Supreme Court of the Territory of Hawaii entitled Ellen Albertina Polyblank, otherwise known as Sister Albertina, Trustee for Stella Keomailani Cockett, and Stella K. Cockett, sole beneficiary under said Trust *vs.* David Kanananakoa, Jonah Kalanianaole, Abigail W. Kawananakoa, Elizabeth K. Kalanianaole and The German Savings & Loan

Society, a corporation, being a bill in equity to foreclose a mortgage, and that a judgment or decree has therein been rendered on the 23rd day of October, A. D. 1905, affirming the decree of the Circuit Court of the First Circuit dated May 4, 1905; that the matter in controversy in said suit exceeds Five Thousand Dollars ($5000.) besides costs; that the German Savings & Loan Society, a corporation, was made a party to the suit as holder of a second mortgage upon the premises in question; that the decree of the Circuit Court of the First Circuit was severable in fact and in law as between the interests of the present appellants and those of said The German Savings & Loan Society; that said The German Savings & Loan Society refused to join in the appeal to the Supreme Court of the Territory of
75 Hawaii, and refuses to join in this appeal; that the interests of said German Savings & Loan Society are not affected by this appeal; that the decree of the Circuit Court of the First Circuit contains a recital of the facts upon which said decree was based and that said findings were affirmed and further facts found and stated by the Supreme Court of the Territory of Hawaii in said judgment or decree of October 23, 1905; that said judgment or decree of the Supreme Court of the Territory of Hawaii is a final judgment or decree and that this is a proper cause to be reviewed by the Supreme Court of the United States on appeal. Wherefore the said appellants pray that an appeal be allowed them in the above recited cause directing the clerk of the Supreme Court of the Territory of Hawaii to send the record and proceedings in said cause with all things concerning the same, except the transcript of evidence, to the Supreme Court of the United States in order that the errors complained of in the assignment of errors herewith filed by the said appellants may be reviewed and if error be found corrected according to the laws and customs of the United States.

Honolulu, November 16, 1905.

DAVID KAWANANAKOA,
JONAH KALANIANAOLE,
ABIGAIL W. KAWANANAKOA,
ELIZABETH K. KALANIANAOLE,
By Their Attorneys, C. W. ASHFORD,
BALLOU & MARX.

76 In the Supreme Court of the Territory of Hawaii.

DAVID KAWANANAKOA, JONAH KALANIANAOLE, ABIGAIL W. KAWANANAKOA, and ELIZABETH K. KALANIANAOLE, Appellants,

vs.

ELLEN ALBERTINA POLYBLANK, Otherwise Known as SISTER ALBERTINA, Trustee for Stella Keomailani Cockett, and STELLA K. COCKETT, Sole Beneficiary under said Trust, Appellees.

Assignment of Errors.

The appellants in the above entitled cause in connection with their petition for appeal herein present and file therewith their assignment of errors as to which matters and things they say that the judgment

or decree entered herein on the 23rd day of October, 1905, is erroneous, to wit:

First. That the Court erred in holding that the decree authorizing foreclosure of the mortgage in question should not be reversed because a purchaser subsequent to the mortgage of a portion of the mortgaged premises was not made a party to the suit.

Second. That the Court erred in holding that the decree authorizing the foreclosure of the mortgage should be affirmed under the circumstances set forth in the opinion of said Supreme Court, to wit, that after the execution of the mortgage the mortgagors conveyed a portion of the mortgaged premises to S. M. Damon, who in turn conveyed it to the Territory; that the suit was originally brought by the mortgagee against the Territory of Hawaii as well as other defendants and later discontinued as to the Territory of Hawaii.

Third. That the Court erred in affirming that portion of the decree authorizing the entry of a deficiency judgment before all of the mortgaged premises are sold.

77 Fourth. That the Court erred in holding that a deficiency judgment should be entered before that portion of the mortgaged premises now held by the Territory of Hawaii was sold.

Fifth. That the Court erred in holding that the Territory of Hawaii could not be joined as a party defendant in a bill to foreclose a mortgage.

Sixth. That the Court erred in holding that when the Territory of Hawaii becomes the purchaser of lands subject to a mortgage a bill in equity to foreclose said mortgage cannot be maintained against the Territory of Hawaii.

Wherefore the appellants pray that said judgment or decree may be reversed and that the appellants may have an adjudication and decree in their favor as herein specified.

Honolulu, November 16th, 1905.

C. W. ASHFORD,
BALLOU & MARX,
Attorneys for Appellants.

78 In the Supreme Court of the Territory of Hawaii.

DAVID KAWANANAKOA, JONAH KALANIANAOLE, ABIGAIL W. KAWANANAKOA, and ELIZABETH K. KALANIANAOLE, Appellants,

vs.

ELLEN ALBERTINA POLYBLANK, Otherwise Known as SISTER ALBERTINA, Trustee for Stella Keomailani Cockett, and STELLA K. COCKETT, Sole Beneficiary under said Trust.

Order Allowing Appeal.

It is hereby ordered that the appeal of the above named appellants in the cause entitled Ellen Albertina Polyblank, otherwise known as Sister Albertina, Trustee for Stella Keomailani Cockett, and Stella K. Cockett, sole beneficiary under said Trust *vs.* David Kawananakoa, Jonah Kalanianaole, Abigail W. Kawananakoa, Elizabeth K. Kalanianaole and the German Savings & Loan Society, a corpora-

tion, to the Supreme Court of the United States be and is hereby allowed as prayed.

Honolulu, T. H., Nov. 16, 1905.

W. F. FREAR,
Chief Justice of the Supreme Court of the Territory of Hawaii.

79 In the Supreme Court of the Territory of Hawaii.

DAVID KAWANANAKOA, JONAH KALANIANAOLE, ABIGAIL W. KAWANANAKOA, and ELIZABETH K. KALANIANAOLE, Appellants,

vs.

ELLEN ALBERTINA POLYBLANK, Otherwise Known as SISTER ALBERTINA, Trustee for Stella Keomailani Cockett, and STELLA K. COCKETT, Sole Beneficiary under said Trust.

Citation to Appellees on Appeal.

To Ellen Albertina Polyblank, otherwise known as Sister Albertina, Trustee for Stella Keomailani Cockett, and Stella K. Cockett, sole beneficiary under said Trust:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States at the City of Washington in the District of Columbia, thirty days after the date of this Citation pursuant to an appeal allowed and filed in the Clerk's Office of the Supreme Court of the Territory of Hawaii wherein David Kawananakoa, Jonah Kalanianaole, Abigail W. Kawananakoa and Elizabeth K. Kalanianaole are appellants and you are appellees to show cause if any there be why the decree rendered against the said appellants as in said appeal mentioned should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the Honorable W. F. Frear, Chief Justice of the Supreme Court of the Territory of Hawaii, this 16th day of November, 1905.

W. F. FREAR,
Chief Justice Supreme Court, Territory of Hawaii.

Service of a copy of the within Citation is hereby acknowledged this 16th day of November, 1905. E. A. DOUTHITT,
Attorney for Appellees.

80 [Endorsed:] E. 1431. Supreme Court. Territory of Hawaii. David Kawananakoa, *et al.*, Appellants, *vs.* Ellen Albertina Polyblank, *et al.* Appellees. Petition for Appeal. Assignment of Errors. Order Allowing Appeal. Citation. Filed Nov. 16, 1905. George Lucas Clerk. C. W. Ashford Ballou & Marx 303 Stangenwald Bldg. Honolulu Attorneys for Appellants. (Office No:—.)

Endorsed on cover: File No. 20,223. Hawaii Territory, supreme court. Term No. 273. David Kawananakoa, Jonah Kalanianaole, Abigail W. Kawananakoa, and Elizabeth K. Kalanianaole, appellants, *vs.* Ellen Albertina Polyblank, otherwise known as Sister Albertina, Trustee for Stella Koemailani Cockett, and Stella K. Cockett, sole beneficiary under said trust. Filed April 26th, 1906. File No. 20,223.

FILE COPY.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1906.

No. 273.

Office Supreme Court, U. S.
FILED.
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CLERK

DAVID KAWANANAKOA, JONAH KALANIANAOLE, ABIGAIL W. KAWANANAKOA, AND ELIZABETH K. KALANIANAOLE,
Appellants,

vs.

ELLEN ALBERTINA POLYBLANK, otherwise known as SISTER ALBERTINA, Trustee for STELLA KEOMAILANI COCKETT, and STELLA K. COCKETT, Sole Beneficiary Under Said Trust,
Appellees.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII.

BRIEF FOR APPELLANTS.

SIDNEY M. BALLOU,
Attorney for Appellants.

HONOLULU:
HAWAIIAN GAZETTE CO., LTD.
1907

IN THE

Supreme Court of the United States

OCTOBER TERM, 1906.

No. 273.

DAVID KAWANANAKOA, JONAH KALANIANAOLE, ABIGAIL W. KAWANANAKOA, AND ELIZABETH K. KALANIANAOLE,
Appellants,

vs.

ELLEN ALBERTINA POLYBLANK, otherwise known as SISTER ALBERTINA, Trustee for STELLA KEOMAILANI COCKETT, and STELLA K. COCKETT, Sole Beneficiary Under Said Trust,
Appellees.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII.

BRIEF FOR APPELLANTS.

STATEMENT OF THE CASE.

This is a suit in equity, originally brought in a Circuit Court of the Territory of Hawaii, to foreclose a mortgage executed by defendants-appellants to Ellen Albertina Polyblank, plaintiff-appellee, as Trustee for Stella J. Cockett, plaintiff-appellee.

The German Savings and Loan Society, as holder of a subsequent incumbrance, was made a party defendant in the court below and the Territory of Hawaii was also joined as a party defendant as being a subsequent grantee of a part of the mortgaged premises.

It appears from the record that subsequent to the execution of the mortgage the appellants sold a portion of the mortgaged premises to Samuel M. Damon and that subsequently Samuel M. Damon conveyed the same to the Territory of Hawaii. This land was subject to the mortgage and was held at the time of the suit and is still held by the Territory of Hawaii. Nevertheless the plaintiffs below, after certain preliminary pleadings, filed their dismissal as to the Territory of Hawaii (Trans. page 23), and the case thereafter proceeded without this holder of part of the mortgaged premises and against the objection of the defendants, appellants herein, that there was a defect of parties (Trans. page 31) and that no decree should be entered against said defendants, appellants herein, for the foreclosure of said mortgage or for a sale of any part of said premises unless and until the Territory of Hawaii should be brought before the court.

There was no dispute as to these facts at the trial but the Circuit Judge overruled the contention of Appellants and signed a decree of foreclosure ordering the sale of the mortgaged property, omitting the portion held by the Territory of Hawaii, and authorizing the entry of a deficiency judgment against said appellants for the balance remaining due after said sale. On appeal the Supreme Court of the Territory affirmed the decree, holding that a suit to foreclose a mortgage may be brought against the mortgagors without joining a subsequent purchaser of a portion of the mortgaged premises, and a deficiency judgment against the mortgagors may be authorized without first foreclosing the interest of the subsequent purchaser when that subsequent purchaser is the Territory of Hawaii.

From that final decree of the Supreme Court of the Territory of Hawaii the mortgagors, Kawananakoa and Kalanianaole and their wives, have appealed to this Honorable Court, The German Savings and Loan Society refusing to join in the appeal.

SPECIFICATION OF ERRORS.

Appellants say that the decree of the Supreme Court of the Territory of Hawaii is erroneous in two particulars, to-wit:

(1) That said decree holds that a suit to foreclose a mort-

gage may be brought against the mortgagors without joining a subsequent purchaser of a part of the mortgaged premises as a defendant.

(2) That said decree holds that in a suit to foreclose a mortgage the court may authorize the entry of a deficiency judgment against the mortgagors without selling a part of the mortgaged premises held by a subsequent purchaser when that subsequent purchaser is the Territory of Hawaii.

ARGUMENT.

I.

The owners of the equity of redemption of all parts of the premises covered by a mortgage must be made defendants in a suit in equity to foreclose that mortgage.

The result of a violation of this rule is that the whole burden of the mortgage debt will be placed on a part of the land instead of being distributed pro rata over the whole thereof, which would be manifestly unjust.

See *Detweiler v. Holderbaum*, 42 Fed. 337.

Not one of the authorities cited on this question by the Supreme Court of the Territory (Trans. page 43) is in point because each one of them is a case of foreclosing against the original mortgagor without joining the holder of the equity of redemption of the entire premises, in which case the foreclosure is good as far as it goes, and the holder of the equity has the right to redeem. In the case at bar, as in *Detweiler v. Holderbaum, supra,* the premises have become divided among several coördinate interests, all of which, according to that decision, should be before the court.

II.

No deficiency judgment should be entered against the mortgagors until all of the mortgaged premises have been sold and the proceeds applied to the payment of the mortgage debt.

We believe that the justice of this, as a general rule, is

obvious. In a foreclosure proceeding the land is the primary fund to which the mortgagee is resorting for payment and the personal obligation of the mortgagor is secondary, to be resorted to only after the exhaustion of the security.

It is true that a mortgagee may waive the mortgage and sue in assumpsit on the note and recover judgment against the mortgagors for the full amount of the debt, but having elected to pursue his other remedy of foreclosure he is compelled to follow the course appropriate to that procedure.

"In a case like this (foreclosure by bill in equity) it seems to us that no personal judgment for any specific sum of money can be rendered even against the mortgagor, until the mortgaged premises have been sold, and the proceeds applied to the mortgage debt; for he can only be called upon, in such an action, to pay any deficiency in the proceeds of the sale of the property pledged by him for payment of the debt; and we do not see how such deficiency can be ascertained until the property has been sold, and the proceeds applied, and hence we do not see how any judgment for any specific sum of money can be rendered until the amount of such deficiency has been thus ascertained. * * * Of course the plaintiffs, if so disposed, might have brought an ordinary action at law on the note, in which event they would have been entitled to recover judgment, and issue execution for the whole amount due upon the note. But they had a choice of remedies,—the ordinary action on the note and a proceeding to foreclose the mortgage; and having adopted the latter, they must be required to pursue the course appropriate to such a proceeding."

Hall v. Young, 29 S. C. 64.

The mortgagees having elected to proceed by foreclosure, we do not think there will be any question raised as to the general principle that the security must be exhausted by a sale of the entire mortgaged premises before a personal judgment for the deficiency can be rendered.

The jurisdiction of courts of equity to render deficiency judgments in suits for the foreclosure of mortgages is purely statutory.

Wiltsie on Mortgage Foreclosures, Sec. 601.
Orchard v. Hughes, 1 Wallace 73, 77.
9 Ency. of Pl. and Pr. 451.

The exact source of authority for the practice of entering deficiency judgment in the Territory of Hawaii is somewhat doubtful. It may be found in Section 2169 of the Revised Laws of 1905 or more probably in Equity Rule 92 of the Supreme Court of the United States. In either case the rule is general that the security must be exhausted before a personal judgment for the deficiency can be rendered.

Bull v. Coe, 77 Cal. 54, 60.
Powell v. Patison, 100 Cal. 236, 239.
Clapp v. Maxwell, 13 Neb. 542, 543.
Seckel v. Backhaus, Fed. cases No. 12, 599.

The main issue of the case, however, is raised by the contention that this case is an exception to the general rule because the part of the mortgaged premises which we contend should be sold before a deficiency judgment is entered is now vested in the Territory of Hawaii. This alleged exception is based on the pretended exemption of the Territory of Hawaii from suit except as expressly authorized by its own legislature, in Chap. 129 of the Revised Laws of 1905.

There seem to be two possible arguments in support of this alleged exemption, (a) that the Territory has not the capacity to be sued in a case of this kind; and (b) that although having the capacity, it has the right to designate under what terms and conditions it may be sued and to exempt itself from suit in other cases.

In a previous decision upon the liability of the Territory to be sued both of these grounds were apparently relied upon, although they appear to be inconsistent with each other.

Coffield v. Territory of Hawaii, 13 Haw. 478.

A. The Territory of Hawaii has the capacity to be sued

So far as the first point is concerned we contend that the Territory of Hawaii is a municipal corporation with capacity to sue and be sued. A municipal corporation may be defined as follows:

"We may therefore define a municipal corporation to be the incorporation by the authority of the government of the inhabitants of a particular place or district and authorizing them in their corporate capacity to exercise subordinate specified powers of legislation and regulation with respect to their local and internal concern. This power of local government is the distinguishing feature of a municipal corporation proper."

1 Dillon on Municipal Corporations, Sec. 20.

"Although not styled such, each one of the United States in its organized political capacity, is in effect a public corporation."

1 Dillon Municipal Cor., Sec. 31.

"Every State is a corporation, and as such may make contracts and may suffer and commit wrongs, and may enforce its rights and redress its injuries by civil action."

1 Sherman and Redfield, Negligence, Sec. 249.

"Even the United States may be said to be a corporation."

1 Sherman and Redfield, Negligence, Sec. 249.

"The most usual conception of a corporation is that it is a collection of natural persons joined together by their voluntary action or by legal compulsion by or under the authority of an Act of the Legislature to accomplish some purpose pecuniary, ideal or governmental, authorized by the legislature under a scheme of organization and by methods thereby prescribed or permitted, with the faculty of having a continuous succession during the period prescribed by the legislature for its existence; of having an individual name by which it may make and take contracts and sue and be sued, and of acting as a community in respect of all matters within the scope of the purpose for which it is created."

1 Thompson on Corporations, Sec. 1.

It is apparent that the Territory of Hawaii falls exactly within the definitions of Dillon and Thompson. It is equally apparent that the Territory is not in the least analogous to the quasi-corporations known as counties, townships or school districts which have not the complete right of local self-government in the sense that a municipal corporation proper has.

This Court has called the Territories "organized municipalities" and likened them to the District of Columbia.

"Ordinarily these terms (States of the Union) would be held to apply to those political communities exercising various attributes of sovereignty which compose the United States, as distinguished from the organized municipalities known as Territories and the District of Columbia."

Talbott v. Silver Bow County, 139 U. S. 438, 445.

"This Court has repeatedly held that Congress has full legislative power over the Territories, as full as that which a State Legislature has over its municipal corporations."

Utter v. Franklin, 172 U. S. 416, 423.

The closest analogy that can be drawn is between the Territory of Hawaii and the District of Columbia. The latter has been held to be a municipal corporation.

Barnes v. District of Columbia, 91 U. S. 540.

Every municipal corporation may be sued.

It is entirely immaterial that the Organic Act is silent upon the right of the Territory to sue and be sued. These powers are inherent in all municipal as well as other corporations. In addition to the statement from Thompson on Corporations quoted above, in connection with the definition of a corporation, we may cite the following authorities:

"The creation by the legislature of a body corporate for any purpose impliedly confers upon it the power to sue and be sued so far as may be necessary to maintain its corporate rights and to enforce its corporate duties. In general it may be said that the power to sue and be sued is, by the principles of common law, an incident of every corporation."

6 Thompson on Corporations, Sec. 7360.

"Municipal corporations are subject to be sued upon contracts and in tort."

2 Dillon Municipal Corporations, Sec. 935.

See also Ingersoll on Public Corporations, page 492.

Prout v. Pittsfield Fire District, 154 Mass. 450.

City of Janesville v. Milwaukee, Etc., R. R. Co., 7 Wis. 484.

It has always been assumed since the passage of the Organic Act that the Territory has the power to sue, although such power is nowhere expressly conferred.

The Territory has assumed the right and capacity to bring suits, which capacity has never been questioned. Instances of civil suits in which the Territory has been plaintiff may be found in the Reports, as for example:

Territory of Hawaii v. Liliuokalani, 14 Haw. 88; Bill for Injunction.

Territory of Hawaii v. Oahu County Supervisors, 15 Haw. 365, Quo Warranto.

Territory of Hawaii v. Kerr, Bill for Injunction, 16 Haw 363.

Territory of Hawaii v. McCandless, Bill for Injunction, 16 Haw. 728.

Territory of Hawaii v. Cotton Bros., Tort, 17 Haw. 374, 445, 608, 618, 645.

The Territory has also been defendant in several suits, two of which have come before this court:

Damon v. Hawaii, 194 U. S. 154;
Carter v. Hawaii, 200 U. S. 255.

Within the past two years the Territory has created counties, giving each county the express power to sue and be sued in its corporate name. (Session Laws of 1905, Act 39, Section 9.) It can hardly be urged that the Territory could delegate a power which it did not itself possess, yet this enactment has been expressly sustained by the courts.

County of Oahu v. Whitney, 17 Haw. 174, 180.

B. The Territory of Hawaii cannot exempt itself from suit by its own legislative enactment.

As to the second point, we maintain that the Territory of Hawaii cannot by its own legislative enactments exempt itself from liability to suit or prescribe any certain class of cases in which alone it may be sued. The exemption of the United States and each of the several States from suit, except so far as is authorized by their own Legislatures, has nothing to do with the corporate capacity of either the United States or the several

States, but is a mere privilege which when waived leaves the sovereign State liable to suit like any other public corporation. It is based solely upon sovereignty, and the reading of any of the cases which discuss this principle will show how inapplicable the reasoning of those cases will be when applied to a Territory which has no sovereignty.

"The principle is elementary that the State cannot be sued in its own courts without its consent. This is a privilege of sovereignty."

Railroad Company v. Tennessee, 101 U. S. 337, 339.

"It is difficult to see on what solid foundation of the principle the exemption from liability to suit rests. It seems most probable that it has been adopted in our courts as a part of the general doctrine of publicists that the supreme power in every State, wherever it may reside, shall not be compelled, by process of courts of its own creation, to defend itself from assaults in those courts."

United States v. Lee, 106 U. S. 196, 206.

Both the language last above quoted and the decision itself show that the power is not one to be extended, and there is certainly no warrant for extending it to the case of a Territory which possesses no sovereignty whatever.

"But before a State is admitted into the Union,—that is, while it is in its Territorial condition,—it possesses no sovereignty whatever * * * during the Territorial period the general government has entire dominion and sovereignty, national and municipal, federal and state, over the Territories."

Carroll v. Price, 81 Fed. 137, 141.

See also *Talbott v. Silver Bow County,* 139 U. S. 438, 445.

It is true that there is on the statute books a claim of exemption on behalf of the Territory. (Revised Laws of Hawaii, Sec. 2000. Laws of the Republic, Act. 26.)

Although the language of this act has been altered in conformity with the political changes which have made Hawaii a Territory of the United States, the law was passed in 1894 at the time Hawaii was an independent Republic possessing full

sovereignty. It can be found in its original form in the Civil Laws of 1897, Section 1530. The entire Act is full of references to citizenship, allegiance and other matters directly pertaining to the exercise of a full sovereignty. So far as this Act may still be valid as a law of procedure for the prosecution of the claims thereby allowed we are not obliged to consider, but we claim that the exemption from actions therein claimed was an attribute of the sovereignty of the Republic of Hawaii and has been impliedly repealed by the Organic Act which has extinguished the last vestige of that sovereignty.

After an existence of nearly a century as an independent nation, it is perhaps not remarkable that the idea that the Territory possesses sovereignty or some of its attributes is hard to eradicate. Shortly after annexation the Supreme Court of the Territory of Hawaii claimed that there were two sovereignties then in force within the Territory.

In Re Wong Tuck, 11 Haw. 600.

Less than two weeks later, upon further argument, it was obliged to reverse itself upon this point.

"On a careful re-examination of the subject, with the additional light thus given, we believe that the conclusion reached by the majority of the court in the Wong Tuck case on this question of jurisdiction was not founded on a correct view of the law and that it should be reversed.

"The Hawaiian Islands are now a part of the territory of the United States. There are not two separate sovereignties here, such as exist in each of the States, within the meaning of the rules laid down in the Booth cases, 21 Howard 506. The decision in those cases is not, therefore, in point."

In Re Ah Ho, 11 Haw. 654, 658.

In a case of ejectment brought against the Territory counsel for plaintiff conceded that the Territory might be sued only in so far as it consented, and the validity of the Statute claiming exemption does not appear to have been questioned.

Bush v. Territory of Hawaii, 13 Haw. 1.

In the next case in which the Territory was sued the court refers to the general rule that a State is not liable to be sued

except by its consent, without reference to any possible distinction between a State and a Territory in this regard; and then, as already pointed out, bases its decision upon an alleged incapacity of the Territory to be sued, calling it a quasi-corporation as distinguished from a municipal corporation proper.

Coffield v. Territory of Hawaii, 13 Haw. 478.

We claim that the two cases last cited would have been good law under the Monarchy or the Republic, but are erroneous as applied to a Territory of the United States, the Court overlooking entirely, or failing to give due weight to the extinction of the sovereignty upon which exemption from suit can alone be based.

As we have said the closest analogy that can be drawn is between the Territory of Hawaii and the District of Columbia. Each is subject to the exclusive jurisdiction of Congress under clauses of the Constitution meaning substantially the same. Each has been granted a large measure of self-government by Congress. A discussion by this Court of the nature of the District of Columbia applies very accurately to the Territory of Hawaii.

"One argument of the plaintiff's counsel in this connection is, that the District of Columbia is a separate State or Sovereignty according to the definition of writers of public law, being a distinct political society. This position is assented to by Chief Justice Marshall, speaking for this Court in the case of *Hepburn v. Ellzey,* 2 Cranch 445, 452, where the question was whether a citizen of the District of Columbia could sue in the Circuit Courts of the United States as a citizen of a State. The court did not deny that the District of Columbia is a State in the sense of being a distinct political community; but held that the word "State" in the Constitution, where it extends the judicial power in cases between citizens of the several "States," refers to the States of the Union. It is undoubtedly true that the District of Columbia is a separate political community in a certain sense, and in that sense may be called a State; but the sovereign power of this qualified State is not lodged in the corporation of the District of Columbia, but in the Government of

the United States. Its supreme legislative body is Congress. The subordinate legislative powers of a municipal character which have been or may be lodged in the city corporations, or in the District corporation, do not make these bodies sovereign." * * *

"We are clearly of opinion that the plaintiff is a municipal corporation, having a right to sue and be sued, and subject to the ordinary rules that govern the law of procedure between private persons."

Metropolitan Rd. v. District of Columbia, 132 U. S. 1, 9.

See further as to the liability of the District of Columbia to be sued:

Barnes v. District of Columbia, 91 U. S. 540.

Moreover a mortgagee of land may have relief even against a sovereign State.

Where a person who has given a mortgage of lands is afterwards attainted, the mortgage may be set up against the State as having succeeded to the rights of the mortgagor.

Jackson v. Pierce, 10 Johns (N. Y.) 414, 417.

The English Chancery Courts refuse to order a sale against the Crown, but direct that the mortgagee shall hold and enjoy the mortgaged premises until the Crown thinks it proper to redeem the estate.

Lutwich v. Attorney General, cited in 2 Atkyns 223.

Hodge v. Attorney General, 3 Younge and Collyer Exch. 342.

Rogers v. Maule, 1 Younge & Collyer Ch. 4.

But even if no relief could be had against the Territory in this action, we submit that the mortgagee would not be entitled to a deficiency judgment against the mortgagors. She is entitled to such a judgment under Equity Rule No. 92 only upon a sale of the mortgaged land and if she is not able to compel a sale of all of that land even through no fault of her own, she cannot have deficiency judgment though she may have a remedy in some other proceeding.

The mortgagors, Appellants herein, are not responsible for

the misfortune, if misfortune there be, of the mortgagee. They did not convey to the Territory, but to a private individual who, at a subsequent date, conveyed to the Territory. It is obvious that the mortgagors were acting within their full rights and are not estopped from setting up the defense put forward in this cause.

We respectfully submit that the decree of the Supreme Court of the Territory of Hawaii should be reversed and the case remanded.

SIDNEY M. BALLOU,
Attorney for Appellants.

FILE COPY.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

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APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII.

BRIEF FOR APPELLEES.

ALDIS B. BROWNE,
ALEXANDER BRITTON,
E. A. DOUTHITT,
Counsel for Appellees.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1906.

No. 273.

DAVID KAWANANAKOA, JONAH KALANIANAOLE, ABIGAIL W. KAWANANAKOA, AND ELIZABETH K. KALANIANAOLE, APPELLANTS,

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APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII.

BRIEF FOR APPELLEES.

Statement of the Case.

This case comes here on appeal from a decree of the Supreme Court of the Territory of Hawaii (Rec., 43-44) affirming a decree (Rec., 30-35) of the Circuit Court of the First Judicial Circuit of that Territory foreclosing a mortgage on certain real estate in the Island of Oahu, and in favor of the present appellees—Ellen Albertina Polyblank, otherwise Sister Albertina, as trustee for Stella Keomailani Cockett,

and Stella K. Cockett, in her own right as sole beneficiary of the trust—and against the mortgagors and appellants, David Kawananakoa and Jonah Kalanianaole, and their respective wives, Abigail W. Kawananakoa and Elizabeth K. Kalanianaole.

The German Savings and Loan Society, a corporation, as holder of a junior mortgage on the property, was also joined as respondent to the bill and is included in the decree of foreclosure, but, being satisfied therewith, did not appeal from the decree of the lower court.

The trust under which Sister Albertina sues was created by deed of October 19, 1899 (Rec., 7-8), from Stella Keomailani Cockett and James D. Cockett, her husband, conveying the lands involved in this foreclosure and other lands to Sister Albertina, of St. Andrew's Priory, Island of Oahu, upon the following trusts:

> "During the life of Stella Keomailani Cockett, wife of James D. Cockett, of Honolulu, to pay over to her the net rents and profits thereof, or at her election to allow her, the said Stella K. Cockett to occupy and enjoy the said estate, she paying the taxes and all necessary charges and expenses (and at her death to convey the said estate to her heirs-at-law); but the said trustee or any successors in said trust, may in her discretion, at any time upon the request in writing of said Stella Keomailani Cockett, sell and convey the said estate, free from the trusts hereby created, holding the proceeds of such sale upon the same trusts as are herein expressed regarding the estate hereby conveyed, and any purchaser of said estate at any such sale, shall not be answerable for the application of the purchase-money, or for the lack of any written request of sale; but the said trustee, or any successor in said trust may, at any time, in her discretion convey and transfer the estate hereby conveyed, or the proceeds thereof, if sold, to the said Stella K. Cockett and the trust hereby created shall thereby be wholly determined, and the trustee wholly discharged and released therefrom."

By deed dated May 8, 1902 (Rec., 9-10), Sister Albertina, as trustee for Stella K. Cockett under the deed in trust of October 19, 1899, conveyed to the appellees, David Kawananakoa and Jonah Kalanianaole, for a consideration of $11,832, certain lands by metes and bounds held by her under said trust "and containing an area of 316,284 square feet, or 7.26 acres more or less."

Mrs. Cockett and her husband also joined in the deed.

Of the purchase price of $11,832 the grantees, Kawananakoa and Kalanianaole, paid $3,832 in cash (Rec., 25) and gave their promissory note (Rec., 4), due one year after date, and with interest at 7 per cent., for the balance of $8,000. To secure this note Kawananakoa and Kalanianaole, joined by their wives, executed a mortgage of even date—May 8, 1902—with the deed and covering the whole of the premises purchased (Rec., 11-12). This mortgage was duly recorded, on the day of its execution, in the office of the register of conveyances, at Honolulu (Rec., 5, 39).

Thereafter, by deed dated September 10, 1903 (Rec., 17-19), the appellants, Kawananakoa *et ux.* and Kalanianaole *et ux.*, sold and conveyed to Samuel M. Damon, for a consideration of $1,290.70, four separate parcels of land, portions of the mortgaged premises, containing an aggregate of 8,175 square feet, or about 19/100ths of an acre.

By deed dated November 7, 1903, Samuel M. Damon conveyed to the Territory of Hawaii all those portions of the mortgaged premises conveyed to him by the appellants' deed of September 10, 1903, *supra*, (Rec., 15, 27), and such parcels are now held and owned by the Territory of Hawaii "in its political and public capacity" and "are now included in and used as a part of certain of the public streets and highways within the city and district of Honolulu, to wit, of a certain street and highway called by the name of the Pauoa road" (Defendants' Plea, Rec., 15; Amended Answer, Rec., 27).

The principal of the note was not paid on maturity and no interest was paid beyond June 25, 1903 (Rec., 5).

Such, then, was the condition of affairs on September 26, 1904, when Sister Albertina, as trustee for Stella K. Cockett, filed bill to foreclose the mortgage (Rec., 2-7). The appellants David Kawananakoa, Jonah Kalanianaole, Abigail W. Kawananakoa, and Elizabeth K. Kalanianaole, as makers of the mortgage, are made parties respondent, and also the German Savings and Loan Society, as a junior lienor. The Territory of Hawaii was also joined as respondent, paragraph XIII of the bill (Rec., 6) alleging—

> "That the respondent The Territory of Hawaii has or claims to have some interest or claim upon said above described premises or some portion thereof, as a purchaser, the exact nature of which is unknown to complainant, but the same, whatever it may be, is subsequent to and subject to the lien of complainants' mortgage."

The bill, after setting forth the facts substantially as above stated, prays for a decree foreclosing the mortgage; the sale of the mortgaged premises and application of the proceeds of sale, after payment of costs and attorneys' fees, to the payment of the indebtedness secured; and, in the event that such proceeds are insufficient to discharge the indebtedness secured by the mortgage, prays judgment against David Kawananakoa and Jonah Kalanianaole for the amount of the deficiency.

The bill of complaint was afterwards amended by adding the name of Stella K. Cockett, as sole beneficiary of the trust, as a complainant (Rec., 37).

The appellants, Kawananakoa *et ux.* and Kalanianaole *et ux.*, thereupon interposed a plea to the jurisdiction (Rec., 14-16), in which they set up the fact of the conveyance of a part of the mortgaged premises to Samuel M. Damon by deed of September 10, 1903, and the subsequent conveyance

of the same lands by Damon to the Territory of Hawaii, and that such lands "are now owned by the Territory of Hawaii, in "its political and public capacity, * * * and are now "included in and used as a part of certain of the public "streets and highways within the city and district of Hono- "lulu, to wit, of a certain street and highway commonly "called by the name of Pauoa road."

The plea further alleges (Rec., 15):

> "4. That the interests and equities of all persons concerned in and under the mortgage aforesaid cannot be adjusted and determined by this honorable court, in that it is beyond the power and jurisdiction of this honorable court to make or render such decree in this cause as will or can subject that portion of said mortgaged land and premises which has been so conveyed by these defendants to said Samuel M. Damon, and has been so conveyed by said Samuel M. Damon to said Territory, to sale in satisfaction of the lien of said mortgage, as the same is, in and by said bill of complaint, alleged to exist; and that it is beyond the authority and jurisdiction of this honorable court to subject the portion of said mortgaged land and premises so conveyed as aforesaid. to its proportionate share. or to any share of the lien or incumbrance of said mortgage; and that it is beyond the authority and jurisdiction of this honorable court to decree the delivery of the possession of said portion of said mortgaged land and premises so conveyed as aforesaid, from and out of the possession of said Territory; or (and) of its said executive officer, the superintendent of public works aforesaid.
>
> "5. And these defendants submit that they have a right to insist that the matters alleged and set forth in said bill of complaint shall be determined and adjudicated, (if at all) in and before a court possessing full and ample jurisdiction of all the parties in interest. and full and ample authority and jurisdiction to deal with all and singular the premises mentioned, described and conveyed in and by the mortgage mentioned in said bill of complaint; and

having full and ample authority and jurisdiction to dispose of all and singular the premises so mortgaged, and to subject the same to the lien, (if any) of said mortgage, and to decree and enforce its decree for the sale, and for the delivery of possession of all and singular the land, property, and premises mentioned, described, conveyed and included in and by the mortgage in said bill of complaint mentioned, in the event that a sale of said property or any thereof, shall be ordered and adjudged in and by the final decree herein."

A general demurrer to the bill was filed by the Territory (Supplemental Record, p. 2), but before submission on the plea to the jurisdiction and this demurrer the complainants dismissed their bill as to the Territory (Rec., 23).

The case was then argued and submitted on respondents' plea to the jurisdiction (*supra*), and the same was overruled with leave to answer (Rec., 38), whereupon these appellants noted an exception to such ruling and filed their answer (Rec., 23-29). This answer substantially admits all the essential averments of the bill of complaint, except that it is alleged (pars. 3-7) that the "patches or lois of Nakamakaweuweu"—those portions of the premises covered by the second mortgage to the German Savings and Loan Society—were owned by Kawananakoa and Kalanianaole in fee simple before the deed to them of May 8, 1902, and were not intended to be covered by the mortgage.

The answer further sets up an alleged defect of parties, in that one Adrian M. Keoho, who purchased the right, title, and interest of appellant Jonah Kalanianaole in the mortgaged premises at a sale under execution held January 20, 1905—after the institution of this suit—was not made a respondent (pars. 11 and 12, answer).

The German Savings and Loan Society also filed answer, setting up its second mortgage on a portion of the premises (Rec., 20-22).

Thereupon the court, upon the pleadings and the proof offered (Rec., 39-41), entered a decree of foreclosure (Rec., 30-35), in which it was found (par. 2) that the respondents, David Kawananakoa and Jonah Kalanianaole, were indebted to complainants in the sum of $8,000, principal of the note and mortgage sued upon, and interest thereon at 7 per cent. from June 25, 1903, and that they were personally liable for the whole amount thereof, and also (par. 3) for $44.50 costs; and (par. 10) that there was no mistake or misunderstanding between the parties as to the property covered by the mortgage, and that the same was intended to cover and did cover all the land described therein, including the lois, or patches, of Nakamakweuweu; and the decree directed a sale, first, of the 5.17 acres remaining after the deduction of the portion conveyed to the Territory of Hawaii and the lois, or patches, of Nakamakaweuweu, and if the amount realized was insufficient to satisfy the judgment, then a sale of the lois, or patches, of Nakamakaweuweu, upon which the German Savings and Loan Society held a second mortgage. The decree further—

> "Ordered, adjudged and decreed that if the moneys arising from the sales shall be insufficient to pay the amount so found due complainants as above stated, with interest, costs, and expenses of sale aforesaid, the commissioner specify in his report the amount of such deficiency and balance due to complainants in his said sale, and that on the coming in and filing of said return, the clerk of this court docket a judgment for such balance against the respondents David Kawananakoa and Jonah Kalanianaole and that the respondents David Kawananakoa and Jonah Kalanianaole pay to the said complainants the amount of such deficiency and judgment, with interest thereon at the rate of six per cent. per annum from the date of said last mentioned return and judgment, and that the complainants have execution therefor."

From this decree these appellants appealed (Rec., 42) to the Supreme Court of the Territory, and that court, on October 23, 1905, affirmed the decree of the circuit court, saying in the opinion by Mr. Justice Wilder (Rec., 43):

> "This is an appeal from a decree of foreclosure and sale under a mortgage from D. Kawananakoa and J. Kalanianaole to Sister Albertina, trustee for Stella K. Cockett. The suit was brought by the mortgagee against the mortgagors and their wives, the German Savings & Loan Society, a junior mortgagee of a portion of the mortgaged premises, and the Territory of Hawaii, and later discontinued as to the Territory. After the execution of the mortgage the mortgagors conveyed a portion of the mortgaged premises to S. M. Damon, who, in turn, conveyed it to the Territory. The decree authorized the entry of a deficiency judgment against the mortgagors in case the proceeds from a sale of the mortgaged premises should be found to be insufficient to pay the amount due.
>
> "The first claim of appellants is that the decree should be reversed because a purchaser, subsequent to the mortgage, of a portion of the mortgaged premises was not made a party to the suit. It is clear that, unless joined as a party, the rights of a subsequent purchaser cannot be affected or concluded by the decree. The mortgagors have no reason to complain because their interest in the mortgaged premises is foreclosed without joining the subsequent purchaser of a portion. It follows that the foreclosure is good as far as it goes. See *Childs v. Childs,* 10 O. St., 339; *Landon v. Townshend,* 112 N. Y., 93; 2 *Jones on Mortgages,* sec. 1395; *Kay v. Whittaker,* 44 N. Y., 565; *Merriman v. Hyde,* 2 N. W., 218.
>
> "It is further claimed that no deficiency judgment should be entered against the mortgagors until all of the mortgaged premises are sold. All that the mortgagors can claim is that the mortgagee should foreclose on and have sold all of the mortgaged property that is possible, that is, that she should foreclose all that the law allows her to foreclose, before entering up a deficiency judgment. In this case all of the mortgaged property is to be sold except that part

which is now held by the Territory. The interest of the Territory in that portion cannot be foreclosed and sold without joining the Territory as a party defendant, and that cannot be done (see chapter 129 of the Revised Laws). The mortgagee has done all that she can, and it would be inequitable that she should suffer through no fault of her own, particularly when the mortgagors have received a substantial benefit by reason of the transfer.

"*Clark v. Simmons,* 8 N. Y. Supp., 74, cited in 2 Jones, Mortgages, sec. 1709 B, is in point. In that case it was held that where a mortgage on land partly in New York and partly in another State was foreclosed in New York as to the land therein and that land was sold, plaintiff could have a judgment for a deficiency without foreclosing as to the land in the other State, as the New York courts could not order a sale of that land. The California cases cited by appellants on this question are not in point, as they are controlled by a statute which has no force in this Territory.

"Appellants also claim that the decree, in describing the land to be sold, is erroneous in that it does not follow the description in the mortgage. The circuit judge found, as a matter of fact, against this contention. So far as appears on this appeal, we cannot see that the circuit judge erred, and therefore this objection must be overruled.

"The decree appealed from is affirmed."

ARGUMENT.

The gravamen of appellants' complaint is that the court below erred in holding that a deficiency judgment might be entered against them, although the Territory of Hawaii, the owner, by subsequent purchase of a portion of the mortgaged premises, was not a party to the suit, and although sale of that portion held by the Territory was not provided for in the decree. To support this contention, the following propositions are stated by counsel for appellants in his brief, viz:

> (1) "The owners of the equity of redemption of all parts of the premises covered by a mortgage must be made defendants in a suit in equity to foreclose that mortgage."
>
> (2) "No deficiency judgment should be entered against the mortgagors until all of the mortgaged premises have been sold and the proceeds applied to the payment of the mortgage debt."

As statements of the general rule, the propositions advanced are absolutely correct, but, we submit, they do not apply to the case at bar—

(1) Because the Territory of Hawaii could not be made a party to the suit.

And (2) because, by the conveyance to the Territory, the appellees were deprived of their remedy of foreclosure as to such portion, and their security was in effect diminished *pro tanto*. The decree provides for the sale of all the property included in the mortgage which could be sold, and it was hence proper to provide for judgment for whatever deficiency should remain after the sale of all available security.

I.

The Territory of Hawaii Cannot be Joined as Party Respondent in Suit to Foreclose a Mortgage.

There is no provision of the Hawaiian laws providing for suit against the Territory in such case as this. The only provisions of law relating to suits against the Territory are contained in section 2000 of the Revised Laws of Hawaii, originally enacted as section 1 of chapter 26, Laws 1894. This section reads as follows:

> "The Supreme Court shall have exclusive jurisdiction to hear and determine the following matters, and shall determine all questions of fact involved without the intervention of a jury.
>
> "First. All claims against the Territory founded upon any statute of the Territory; or upon any regulation of an executive department; or upon any contract, expressed or implied, with the Territory, and all claims which may be referred to it by either house of the legislature; provided, however, that no suit shall be maintained, nor shall any process issue against the Territory, based on any contract or any act of any territorial officer which such officer is not authorized to make or do by the laws of this Territory, nor upon any other cause of action than as herein set forth.
>
> "Second. All set-offs, counter-claims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Territory against any person making claim against the Territory under the provisions of this chapter."

It will be seen that this section confers a right of action against the Territory in four different classes of cases, within none of which does the cause at bar fall, viz:

(1) Claims founded upon any statute;

(2) Claims founded upon any regulation of an executive department;

(3) Claims founded upon any contract, expressed or implied, with the Territory.

(4) All claims which may be referred to it by either house of the legislature.

It is at once manifest that this suit does not fall within either the first, second, or fourth of these classes, nor is there any contractual relation between the Territory and these appellees which would bring it within the third class. There was no assumption by either Damon or the Territory of the mortgage or any portion thereof.

> "It is universally admitted that, while the land conveyed is still liable for the mortgage debt, the vendee does not, by the mere fact of purchase, render himself personally liable either upon the covenant of his grantor before foreclosure, or for a deficiency after foreclosure. In order to cast upon him any liability, it is necessary to show an assumption by which he has made the debt his own. In other words, the obligation can arise only from contract, and the cases under this head are concerned with the question whether or not such contract of assumption has been made.
>
> * * * * * * *
>
> "In construing the language of deeds conveying mortgaged premises it has been decided that where land is conveyed merely 'subject to' a mortgage the grantee does not undertake, by virtue of such words, to pay the mortgage debt. Such language shows that he merely purchased the equity of redemption."
>
> Am. & Eng. Enc. Law (2d ed.), vol. 20, pp. 986-987.

In this case there was not even a reference to the mortgage in the deed (Rec., 17). Manifestly, then, the purchaser assumed no liability for the mortgage indebtedness, and there was no contract, either express or implied, between the Territory and the mortgagees. Hence, clearly this suit does not come within the third class of cases *supra*, in which the Territory may be sued, and there is no provision of law under

which the Territory could have been joined in suit as party respondent herein.

It is elemental, of course, that the State or sovereign cannot be sued in its own courts without its consent; and this is as applicable to a dependent State or sovereignty as to one which has no suzerain or overlord. The political entity which makes laws and creates tribunals for their enforcement, which creates judicial remedies and legislates as to how, when, and under what conditions rights may be litigated and remedies enforced, manifestly cannot be sued in the courts of its creation except by its own consent and legislative provision. In other case, such political entity would be subordinate to its own creatures.

As said in *Beers vs. State of Arkansas*, 20 How., 527, 529:

> "It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission; but it may, if it thinks proper, waive this privilege, and permit itself to be made a defendant in a suit by individuals, or by another State. And as this permission is altogether voluntary on the part of the sovereignty, it follows that it may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted, and may withdraw its consent whenever it may suppose that justice to the public requires it."

And again, in *Railroad Company vs. Tennessee*, 101 U. S., 337, 339:

> "The principle is elementary that a State cannot be sued in its own courts without its consent."
>
> See also *Briscoe vs. Kentucky Bank*, 11 Pet., 257.

And when a State grants a right of remedy against itself it may attach whatever limitations or conditions it chooses to the remedy; and under our Federal Constitution if one of

the several States gives a right of action against itself, it may thereafter withdraw its consent to be sued, without impairing the obligation of contracts, within the meaning of the constitutional prohibition.

De Saussure vs. Gaillard, 127 U. S., 216.
Antoni vs. Greenhow, 107 U. S., 769.
Railroad Company vs. Tennessee, 101 U. S., 337.
Beers vs. Arkansas, 20 How., 527.

And this rule is equally applicable to the organized Territories of the United States. As said by the Supreme Court of Wisconsin in *Territory vs. Doty,* 1 Pinney, 396, 405, in holding that the Territory could not be sued without its consent:

> "By virtue of its incorporation, all the powers and functions of a sovereign exist—subject only to the supervision and control of the general government. The officers in all branches of the government of the Territory are entitled to similar rights and privileges, and are subject to similar pains and penalties, to those of a sovereign state. And similar provisions are made for the settlement and adjustment of claims against the Territory, and for the disbursement of territorial funds, to those in existence as a sovereign state. For all necessary purposes of government, Wisconsin is as a sovereignty, and should be entitled to the same immunities. It is a Territory of the United States, and is considered thereby a part of the United States or immediately connected therewith. For these reasons we come to the conclusion that the Territory of Wisconsin cannot be sued in the courts of the Territory in the absence of express authority of law for that purpose."

Again, in *Langford vs. King,* 1 Mont., 33, the Supreme Court of Montana said (p. 38):

> "The reason of the law which declares that no government can be sued without its consent, applies to this territorial government as well as to any other government.

"We hold, therefore, that unless permitted by some law of this Territory or of the General Government, no citizen of this Territory can sue it. There is no law of this Territory or act of Congress permitting it. There is, then, no legal power to enforce territorial contracts. In other words, there is no obligation to territorial contracts. They rest simply upon the good faith of the Territory."

Affirmed in *Fisk vs. Cuthbert,* 2 Mont., 593, 598.

But it is contended by appellants' counsel in his brief (pp. 5-12) that the Territory of Hawaii is not such a body politic as possesses immunity from suit in its own courts. Counsel contends that the Territory of Hawaii is a municipal corporation, and as such liable to suit in like manner with private corporations and individuals, and the parallel is attempted to be drawn between the Territory of Hawaii and the District of Columbia. On analysis, we think this proposition at once appears untenable.

Judge Dillon, in his work on Municipal Corporations (3d ed.), section 18, after quoting Chief Justice Marshall's definition of a corporation in *Dartmouth College vs. Woodward,* 4 Wheat., 636, proceeds to thus define *municipal corporations*:

"SEC. 19. *Municipal corporations* are bodies politic and corporate of the general character above described, established by law to assist in the civil government of the country, but chiefly to regulate and administer the local or internal affairs of the city, town, or district which is incorporated.

"SEC. 20. We may, therefore, define a municipal corporation to be the incorporation, by the authority of the government, of the inhabitants of a particular place or district, and authorizing them in their corporate capacity to exercise subordinate specified powers of legislation and regulation with respect to their local and internal concerns. This power of local government is the distinguishing feature of a municipal corporation proper."

Now it is manifest, we think, that the Territory of Hawaii does not fall within the scope of this definition.

The organic act creating the Territory of Hawaii (31 Stats., 141) enacts:

> "SEC. 2. That the islands acquired by the United States of America under an act of Congress entitled 'Joint resolution to provide for annexing the Hawaiian Islands to the United States,' approved July seventh, eighteen hundred and ninety-eight, shall be known as the Territory of Hawaii.
>
> "SEC. 3. That a territorial government is hereby established over the said Territory, with its capital at Honolulu, on the island of Oahu."

And Section 11 provides:

> "That the style of all process in the territorial courts shall hereafter run in the name of 'The Territory of Hawaii,' and all prosecutions shall be carried on in the name and by the authority of the Territory of Hawaii."

Section 55 provides:

> "That the legislative power of the Territory shall extend to *all* rightful subjects of legislation not inconsistent with the Constitution and laws of the United States locally applicable."

And Section 56:

> "That the legislature may create counties and town and city municipalities within the territory of Hawaii and provide for the government thereof."

Section 81 provides:

> "That the judicial power of the Territory shall be vested in one supreme court, circuit courts, and in such inferior courts as the legislature may from time to time establish. And until the legislature shall otherwise provide, the laws of Hawaii heretofore in

> force concerning the several courts and their jurisdiction and procedure shall continue in force except as herein otherwise provided."

By its organic act, then, the Territory of Hawaii is not a corporation "exercising subordinate specified powers of legislation and regulation," in the sense that a municipal corporation does; but its legislative power extends "to *all* rightful subjects of legislation not inconsistent with the Constitution and laws of the United States locally applicable." It creates, itself, municipal corporations—"counties and town and city municipalities." It establishes its own courts and legislates as to their jurisdiction and procedure. Its laws become effective without approval by Congress.

It is true that it is a body corporate—a corporation in a sense—but it is a *public,* not a *municipal,* corporation.

Judge Dillon says (Mun. Corp., sec. 31):

> "Although not styled such, *each one of the United States,* in its organized political capacity, is in effect a public corporation. Corporations, however, as the term is commonly used, do not include States, but only derivative creations, owing their existence and powers to the State, acting through its legislative department. Like corporations, however, a State, as it can make contracts and suffer wrongs, so it may, for this reason, and without express provision, maintain, in its corporate name, actions to enforce its rights and redress its injuries. But a State is not liable to be sued without its consent, although it is not unusual for States, by special enactment, to authorize suits to be brought against them; but, as the permission is voluntary, they may prescribe the terms, and, unless it impairs the obligation of contracts, may withdraw the consent at pleasure."

As said by Mr. Justice Iredell in *Chisholm vs. Georgia,* 2 Dall., 419, 447:

> "Any body politic, sole or aggregate, whether its power be restricted or transcendent, is in this sense

> a corporation. In this extensive sense, not only each State singly, but even the United States, may without impropriety be termed 'corporations.' "

Since the annexation of the Hawaiian Islands, there is, of course, no longer a supreme government in those islands, save that of the United States. The Territory of Hawaii is a body politic created by Congress, and Congress in the exercise of its supreme power may curtail or rescind its powers.

If the term sovereign be used in its limited and perhaps more correct sense, as the seat of *ultimate* power, the Territory of Hawaii is, of course, not sovereign. If, however, there can be such a thing as a limited and delegated sovereignty—a sovereignty which can be resumed—then, in that sense the Territory of Hawaii may be said to possess it. So long as its present status under the organic act continues, the Territory is supreme within the defined limits. Its legislative enactments need no approval to make them law. Its legislative power extends to *all* rightful subjects of legislation not inconsistent with the Constitution and laws of the United States; its courts and the laws which they administer are its own creations.

But we will not argue as to the true meaning and definition of the term "sovereignty." As said by Mr. Justice Wilson (2 Dall., 456): "On this subject, the errors and the mazes are endless and inexplicable."

The immunity of the Territory from suit save by its consent rests upon a more easily defined basis, *i. e.*, upon the practical and common-sense ground that a body politic which enacts its own laws and creates its own courts, defining and limiting their jurisdiction, is of necessity exempt from the jurisdiction of those courts save by its own consent.

In the very nature of things, the creator is not, save with its own consent, under the dominion of its creature; the power which creates tribunals must of necessity be superior to their jurisdiction. If there were to be any general judicial jurisdiction over the Territory, Congress would naturally

have placed that jurisdiction in the Federal courts; yet section 86 of the Organic Act creating the Federal court of local jurisdiction contains no provision for process against the Territory.

It is significant that in none of the acts creating any of the organized Territories has Congress ever provided for the bringing of suits against such Territories, and there is not a single decision to be found holding that such Territories were suable. On examination of the statutes and codes of the various Territories which have been created since the beginning of our Government, it appears that in almost every case there are provisions barring claims against the Territory unless presented within a specified time, less than the general statute of limitations, and in a specified way. This is clear recognition of the immunity of the Territory from general judicial process.

Counsel for appellants (Brief, p. 11) attempts to draw an analogy between the Territory of Hawaii and the District of Columbia, citing *Barnes vs. District of Columbia,* 91 U. S., 540, and *Metropolitan Railroad Co. vs. District of Columbia,* 132 U. S., 1.

The former case deals with the status of the government of the District of Columbia as created by the act of February 21, 1871 (16 Stats., 419); the latter case with the status of that government as established by the act of June 11, 1878 (20 Stats., 102).

The act of February 21, 1871, *supra* (section 1), enacted:

> "That all that part of the territory of the United States included within the limits of the District of Columbia be, and the same is hereby, created into a government by the name of the District of Columbia, *by which name is hereby constituted a body corporate for municipal purposes,* and may contract and be contracted with, *sue and be sued, plead and be impleaded,* have a seal, and *exercise all other powers of a municipal corporation* not inconsistent with the Constitution and laws of the United States and the provisions of this act."

Thus, not only was the government of the District of Columbia, by this act, created *"a body corporate for municipal purposes"*—a municipal corporation pure and simple—but it was in terms provided that it might *"be sued"* and *"be impleaded."* The organic act thus expressly providing that the municipal corporation created as the District of Columbia might be sued, there could, of course, be no doubt as to its liability to suit, and it was so ruled by this court in *Barnes vs. District of Columbia,* 91 U. S., 540, and that this liability extended to the acts of its Board of Public Works.

By the act of June 11, 1878 (20 Stats., 102), the government of the District of Columbia was created in its present form. That act in terms provided that the District of Columbia should *"remain and continue a municipal corporation."* All rights of action and suits for and against the District were expressly preserved *in statu quo.* Mr. Justice Bradley, delivering the opinion of the court in *Metropolitan Railroad vs. District of Columbia,* 132 U. S., 1, reviews the various forms of local government in the District of Columbia from 1800 to date, and concludes (p. 7):

> "Under these different changes the administration of the affairs of the District of Columbia and city of Washington has gone on in much the same way, except a change in the depositaries of power, and in the extent and number of powers conferred upon them. Legislative powers have now ceased, and the municipal government is confined to mere administration. The identity of corporate existence is continued, and all actions and suits for and against the District are preserved unaffected by the changes that have occurred.
>
> "In view of these laws, the counsel of the plaintiff contend that the government of the District of Columbia is a department of the United States Government, and that the corporation is a mere name, and not a person in the sense of the law, distinct from the government itself. We cannot assent to this view. It is contrary to the express language of the statutes. That language is that the District shall 'remain and

continue a municipal corporation,' with all rights of action and suits for and against it. If it were a department of the Government, how could it be sued? Can the Treasury Department be sued? or any other department? We are of opinion that the corporate capacity and corporate liabilities of the District of Columbia remain as before, and that its character as a mere municipal corporation has not been changed.

* * * * * * *

"One argument of the plaintiff's counsel in this connection is, that the District of Columbia is a separate State or sovereignty, according to the definition of writers on public law, being a distinct political society.

* * * "It is undoubtedly true that the District of Columbia is a separate political community in a certain sense, and in that sense may be called a State; but the sovereign power of this qualified State is not lodged in the corporation of the District of Columbia, but in the Government of the United States. Its supreme legislative body is Congress. The subordinate legislative powers of a municipal character which have been or may be lodged in the city corporations, or in the District corporation, do not make those bodies sovereign. Crimes committed in the District are not crimes against the District, but against the United States. Therefore, whilst the District may, in a sense, be called a State, it is such in a very qualified sense. No more than this was meant by Chief Justice Taney, when, in the Bank of Alexandria *v.* Dyer, 14 Pet., 141, 146, he spoke of the District of Columbia as being formed, by the acts of Congress, into one separate political community, and of the two counties composing it (Washington and Alexandria) as resembling different counties in the same State; by reason whereof it was held that parties residing in one county could not be said to be 'beyond the seas,' or in a different jurisdiction, in reference to the other county, though the two counties were subject to different laws.

"We are clearly of opinion that the plaintiff is a municipal corporation, having a right to sue and be sued, and subject to the ordinary rules that govern the law of procedure between private persons."

The essential difference is at once apparent between the District of Columbia, expressly created as a municipal corporation, with liability to suit—a municipal government confined to mere administration, with Congress the legislative body, and where crimes committed in the District are not crimes against the District, but against the United States—and the Territory of Hawaii with its autonomous government, making its own laws, establishing its own courts, and where crimes committed are prosecuted in its own name.

This distinction was clearly pointed out by the Supreme Court of Hawaii in the case of *Coffield vs. Territory*, 13 Haw., 478, wherein Chief Justice Frear, for the court, said (p. 479):

> "The general rule is that a state is not liable to be sued except by its consent. Such consent is often given, though it is seldom extended to cases of tort.
>
> * * * * * * *
>
> "This suit, however, is brought against the Territory on the theory that it was created a municipal corporation by Congress and as such was made liable, like other municipal corporations, for torts of the kind in question, and that the statute above referred to was to that extent repealed by the organic act under which the Territory was created.
>
> "In a certain sense, all governments are municipal corporations. In this sense each of the several States and the United States is such a corporation. Yet these, being sovereignties, are not liable to suit in their own courts except by their own consent."

He then refers to *Barnes vs. District of Columbia, supra*, and continues (p. 481):

> "The government of these islands is very different from that which was provided for the District of Columbia under that statute and was formed under very different conditions. It is that of an organized Territory and is even more like that of a State than is the case with other organized Territories. It is a government for a large area distributed over many islands

separated by wide channels, with comparatively infrequent communication between the islands as well as between different parts of each island and with a scattered population. It is largely a continuation of the form of government previously existing here, which certainly was never regarded as in the nature of a municipal corporation proper. The question is one of the intention of Congress. It cannot safely be said that because the government of this Territory possesses this or that feature in common with the government of the District of Columbia, or any other municipal corporation proper, that therefore Congress intended to create such a corporation here with the usual liabilities of such a corporation. The fact that the Territory is in a sense a municipal corporation does not render it liable to suit. That does not render a State liable to suit. The fact that it is a political subdivision does not render it liable."

* * * * * * *

And in *Bush vs. Hawaii*, 13 Haw., 1, the court also holds that the Territory is not suable except by its consent.

Counsel for appellants admits (Brief, p. 11) that the decisions in these cases would have been good law under the monarchy or the republic, but says that they are erroneous as regards the Territory.

But it was expressly provided by section 6 of the organic act of April 23, 1900 (31 Stats., 141, 142)—

> "That the laws of Hawaii not inconsistent with the Constitution or laws of the United States or the provisions of this act shall continue in force, subject to repeal or amendment by the legislature of Hawaii or the Congress of the United States."

The provisions of section 2000, Revised Laws of Hawaii, providing for suits against the government in certain classes of cases, were first enacted by the legislature of the Provisional Government of Hawaii at the session of 1894-1895. Hawaii was at that time an independent nation, and had, of course, full power to confer or withhold the right of action against

itself. There can be no question as to the validity of the statute when passed; and this statute, being continued in force by section 6 of the Organic Act, *supra*, is now the law of the Territory and limits right of suit against it to the classes of cases therein enumerated. The suggestion (Brief, p. 10) that the statute has been impliedly repealed by the Organic Act is at once negatived by the fact that the laws of Hawaii were carefully examined by Congress before the passage of the Organic Act of April 23, 1900, and section 7 of that act enumerates just which sections of the Civil, Penal, and Session Laws were repealed. Reference thereto will show the large number of acts thus examined and repealed. Plainly, then, it was the intent of Congress that the provisions of existing law relating to suits against the Territory should continue in force. There is no ground on which to argue a repeal by implication. In fact, this statute regulating suits by the Territory was by the act of Congress incorporated into the basic law of the Territory.

Even if the Territory as a subsequent purchaser of a portion of the mortgaged premises came within any of the provisions of section 2000, Revised Laws of Hawaii, the Supreme Court of the Territory could not take original jurisdiction of foreclosure proceedings against appellants. Section 1628, Revised Laws of Hawaii (title XVI, ch. 112), defines the general jurisdiction of the territorial Supreme Court as follows:

> "The Supreme Court shall have appellate jurisdiction to hear and determine all questions of law, or of mixed law and fact, which shall be properly brought before it on exceptions, error or appeal duly perfected from any other court, judge, magistrate or tribunal, according to law, or by reservation of any circuit court or judge; and original jurisdiction in all questions arising under writs of error, certiorari, mandamus, prohibition and injunctions directed to circuit courts, or to circuit judges, or to magistrates, or other judicial tribunals, and returnable before the Supreme Court. The Supreme Court and the several

justices thereof in aid of the appellate jurisdiction of the court shall have power to issue writs of mandamus, certiorari, prohibition and *habeas corpus*, and all other writs necessary or proper to the complete exercise of the appellate jurisdiction of the court, and each of the justices shall have original jurisdiction and power to issue writs of *habeas corpus* and make such writs returnable before himself or the Supreme Court or before any circuit court or any judge thereof" (L. 1892, c. 57, sec. 51).

This section confines the *original* jurisdiction of the Supreme Court to questions "arising under writs of error, certiorari, mandamus, prohibition and injunction directed to circuit courts or to circuit judges, or to magistrates or other judicial tribunals, and returnable before the Supreme Court," and also to *habeas corpus* proceedings. A grant of original jurisdiction is exclusive as to all cases not therein enumerated (*Marbury vs. Madison*, 1 Cr., 137, 173).

But original jurisdiction of suits to foreclose mortages is confined to the circuit judges at chambers by section 1648, Revised Laws of Hawaii, which provides that—

> "The judges of the several circuit courts shall have power at chambers within their respective jurisdictions, but subject to appeal to the circuit and supreme courts, according to law, as follows:
> "First. To hear and determine all matters in equity." * * *
>
> *Carter vs. Gear*, 197 U. S., 348.

And section 1834, Revised Laws of Hawaii, provides that—

> "The several circuit judges may hear and determine in equity, all cases hereinafter mentioned, when the parties have not a plain, adequate and complete remedy at the common law, that is to say:
> "Suits for the redemption of mortgages or to foreclose the same." * * *

Thus original jurisdiction to foreclose mortgages is vested in the circuit judges, and the Supreme Court of the Territory

can exercise only an appellate jurisdiction. So, if the Territory of Hawaii could properly be made a party, the action against the Territory would necessarily have to be brought in the Supreme Court, for no other court would have jurisdiction over it. But if the action were brought in the Supreme Court, that court could acquire no original jurisdiction over the mortgagors, because the Supreme Court is not vested with original jurisdiction in the foreclosure of mortgages, that power being vested in the circuit judges; while if the action were commenced before the circuit judge, who had jurisdiction over the mortgagors, but not over the Territory, the circuit judge could exercise no jurisdiction over the Territory. It will readily be seen that if it is necessary to make the Territory of Hawaii a party to this suit, the appellees would be without remedy, because if the suit were commenced before the circuit judge, it could be objected, as it was in this case by these appellants' plea to the jurisdiction, that the circuit judge had no jurisdiction over the Territory, and therefore all of the parties were not before that court; and likewise if the suit were commenced in the Supreme Court, then the objection could be raised that the original jurisdiction over the parties other than the Territory was vested in the circuit judge and not in the Supreme Court.

Before these appellees dismissed their bill of complaint against the Territory (Rec., 23) appellants set up in their plea to the jurisdiction (Rec., 15)—

> "That it is beyond the power and jurisdiction of this honorable court to make or render such decree in this cause as will or can subject that portion of said mortgaged land and premises which has been so conveyed by these defendants to said Samuel M. Damon, and has been so conveyed by said Samuel M. Damon to said Territory, to sale in satisfaction of the lien of said mortgage, as the same is, in and by said bill of complaint, alleged to exist; and that it is beyond the authority and jurisdiction of this honorable court to subject the portion of said mortgaged land and premises so conveyed as aforesaid, to its proportionate share, or to any share of the lien or incum-

brance of said mortgage; and that it is beyond the authority and jurisdiction of this honorable court to decree the delivery of the possession of said portion of said mortgaged land and premises so conveyed as aforesaid, from and out of the possession of said Territory; or of its said executive officer, the superintendent of public works aforesaid."

And when the suit was dismissed as to the Territory, appellants urged the objection in their amended answer that the court could not proceed to a valid decree, because necessary parties—*i. e.*, the Territory—were not before the court (Rec., 28). In the first instance they object because the Territory *was* made a party, and in the second instance they object because the Territory was *not* made a party. Now these positions are essentially inconsistent and contradictory. If, as now contended, the Territory of Hawaii is a mere municipal corporation, subject to suit in all cases in which a private individual or corporation could be sued, then it would be suable before the circuit judge at chambers and "subject to the ordinary rules that govern the law of procedure between private persons."

Metropolitan Railroad vs. District of Columbia, 132 U. S., 1, 9.

The Territory must either be exempt from suit except by its own consent, and have power to say in what cases and before what tribunal—i. e., its Supreme Court—it may be impleaded, or else it is suable in the same court and in the same way in which a private person would be sued. There is no other alternative. The limitation of jurisdiction in suits against the Territory to the Supreme Court necessarily implies immunity from suit save by consent; otherwise the status of the Territory as a municipal corporation is exactly the same, as regards liability to suit, as that of a private person, and the Territory could be sued in any court having jurisdiction over private individuals in similar causes and in the same way.

II.

The Territory not being suable, it necessarily follows that the entire available security was covered by suit and decree, and deficiency judgment after sale of all security which could be reached is proper.

Appellants by their own act have placed a portion of the mortgaged security beyond reach of the appellees. The mortgagees were in nowise parties to the conveyance of this portion of the mortgaged property. It was made without their permission or consent. Yet appellants urgently contend that, even under these circumstances, they are entitled to have the entire mortgaged premises sold before deficiency judgment can be entered against them.

As a general proposition, a mortgagee is entitled to the entire mortgage debt as security for his loan, but in the case at bar the appellants have by their own act conveyed a portion of the mortgaged premises to another, who in turn conveyed it to the Territory. The appellants have thus deprived these appellees of their right to the entire security. They have received a valuable consideration therefor and now attempt to take advantage of their own wrong. They have just as effectually destroyed a portion of this security as if they had destroyed a portion of the security of a chattel mortgage or removed it out of the jurisdiction. The action of the appellants in this cause is substantially the same in matter of principle, because they have to all intents and purposes destroyed that portion of the security which was conveyed to the Territory. As a further illustration of the principle contended for, we call the attention of this Court to the case of *Clark vs. Simmons,* 8 N. Y. Supp., p. 74, cited in 2 Jones on Mortgages, 6th ed., sec. 1709b. In this case it was held that where a mortgage on land partly in New

York and partly in another State was foreclosed in New York as to the land therein and that land was sold, plaintiff could have a judgment for a deficiency without foreclosing as to the land in the other State, because the New York courts could have no jurisdiction as to the land in such other State. This is practically the situation in the case at bar. It is just the same as if part of the mortgaged land was in the Territory of Hawaii and part of it in the State of California, so far as the jurisdiction of the territorial courts is concerned, because the courts of the Territory could exercise no jurisdiction over the Territory of Hawaii in the case at bar.

It is said in appellants' Brief (pp. 12-13) that they "are not responsible for the misfortune, if misfortune there be, of the mortgagee. They did not convey to the Territory, but to a private individual, who, at a subsequent date, conveyed to the Territory." We say that they are directly responsible for this result. The present status of this portion of the mortgaged land is directly the result of their deed, even though the conveyance was made to the Territory through the intervention of a third party—Damon. The total aggregate area of the parcels sold to the Territory, and which are excluded from the operation of the decree, is 8,175 square feet, or a little less than 19/100 of an acre (Rec., 18-19). For this land appellants have received $1,290.70, its full value (Rec., 17). The strip sold is now part of Pauoa road, a street in the city of Honolulu (Rec., 15).

The total area of the two remaining portions of the mortgaged property, and which are covered by the decree of sale, is 7.12 acres (Rec., 32, 35).

"He who seeks equity must do equity." In the case at bar we are treated to the novel spectacle of one coming into a court of equity and seeking to take advantage of his own wrong. The appellants have, as pointed out above, by their own act put it beyond the power of the appellees to exhaust

the entire security and have likewise received a valuable consideration therefor. When the appellants conveyed a portion of the premises to Damon they received a substantial consideration for the transfer, and now they not only seek to retain the purchase price paid them by Damon—$1,290.70—but in addition thereto seek to obtain the benefits from a sale of this portion of the property to further reduce the loan.

III.

The decree properly provided for a deficiency judgment in the event that the proceeds of sale were insufficient to satisfy the indebtedness.

Equity Rule No. 92 governs the procedure in this case. It provides that—

> "In suits in equity for the foreclosure of mortgages in the circuit courts of the United States, or in any of the courts of the Territories having jurisdiction of the same, a decree may be rendered for any balance that may be found due to the complainant over and above the proceeds of the sale or sales, and execution may issue for the collection of the same, as is provided in the eighth rule of this court regulating the equity practice, where the decree is solely for the payment of money."

In respect to the provision for deficiency judgment, the decree is similar in terms to that which was approved by this court in *Shepherd vs. Pepper*, 133 U. S., 626, 643, which provided that, if the net proceeds of the sale applicable to the claims of Pepper should prove insufficient to discharge them, he should recover from Shepherd whatever amount might remain due of the claims so decreed to be due by Shepherd to Pepper after the application thereto of the net proceeds of sale, and should have execution therefor as at law.

See also *Hayden vs. Snow*, 9 Biss., 511.

IV.

There is no necessity of making a purchaser subsequent to commencement of suit a party to the proceedings.

One of the objections raised in the court below was that Keoho, the purchaser of Jonah Kalanianaole's interest in the mortgaged premises at the sale under execution, held January 20, 1905, and subsequent to the filing of the bill of complaint herein, was not brought in as a respondent. We understand that this contention has now been abandoned.

It suffices to say, as to this, that Keoho, who purchased at the execution sale, was not a judgment creditor; had no interest whatsoever in the mortgaged premises at the date of commencement of this suit; took with full notice of the foreclosure proceedings, and took whatever interest he acquired *pendente lite*.

There is in Hawaii no statutory provision requiring the filing of a *lis pendens* notice. By section 1 of the Revised Laws of Hawaii (1905), ch. 57, sec. 5, Laws of 1892, "The "common law of England, as ascertained by English and "American decisions, is declared to be the common law of "the Territory of Hawaii." Hence, in the absence of any *lis pendens* statute, the common-law rule applies, that one who acquires any interest in property *pendente lite* takes subject to notice and is bound by the judgment or decree.

> "A purchase made of property actually in litigation, *pendente lite*, for a valuable consideration, and without any express or implied notice in point of fact, affects the purchaser in the same manner as if he had such notice; and he will accordingly be bound by the judgment or decree in the suit."
>
> Story, Eq. Jur. (13th ed.), sec. 405, and cases cited.
>
> 2 Jones on Mortgages (6th ed.), sec. 1411.
>
> Wade on Notice, secs. 337-348.
>
> Enc. Pl. & Pr., vol. 9, p. 339, and cases cited.

As said by this court in *Tilton vs. Cofield*, 93 U. S., 163, 168:

> "The law is, that he who intermeddles with property in litigation does it at his peril, and is as conclusively bound by the results of the litigation, whatever they may be, as if he had been a party to it from the outset."

And again, in *Mellen vs. Moline Iron Works*, 131 U. S., 352, it was held (p. 371):

> "Purchasers of property involved in a pending suit may be admitted as parties, in the discretion of the court; but they cannot demand, as of absolute right, to be made parties, nor can they complain if they are compelled to abide by whatever decree the court may render, within the limits of its power, in respect to the interest their vendor had in the property purchased by them *pendente lite*."

So in *Lacassagne vs. Chapuis*, 144 U. S., 119, 125, it was said:

> "It is well settled, in regard to land, that, when a suit is pending in regard to it, a person who purchases under the defendant *pendente lite* is subject to the operation of a writ of possession if one is finally issued on a judgment in the suit."

To the same effect, see also—

Walden vs. Bodley, 9 How., 34, 49.

Secombe vs. Steele, 20 How., 94, 105.

Terrell vs. Allison, 21 Wall., 289.

Eyster vs. Gaff, 91 U. S., 521, 524.

County of Warren vs. Marcy, 97 U. S., 96, 105.

Whiteside vs. Haselton, 110 U. S., 296, 301.

Union Trust Co. vs. Southern Navigation Co., 130 U. S., 565, 570.

Hollins vs. Brierfield Coal & Iron Co., 150 U. S., 371, 386.

And in *Stout vs. Lye*, 103 U. S., 66, 69, this rule was also applied to the case of a judgment creditor whose interest is acquired *pendente lite*.

Of course, in any event, these appellants would have no ground of objection in the non-joinder of Keoho. Even if Keoho were a necessary or proper party to the cause, which he clearly is not, appellants could suffer no possible injury by his nonjoinder, and hence could make no objection.

In conclusion, we submit that the mortgagee has done all she could do, so far as the foreclosure of this mortgage is concerned, and it would be highly inequitable to defeat her remedy on account of appellants' fault, for which she was in no wise responsible. For the reason stated, the decree should be affirmed.

Respectfully submitted,

ALDIS B. BROWNE,
ALEXANDER BRITTON,
E. A. DOUTHITT,
Counsel for Appellees.

Supreme Court of the United States.

No. 273.—October Term, 1906.

David Kawananakoa, Jonah Kalanianaole, Abigail W. Kawananakoa, and Elizabeth K. Kalanianaole, Appellants,
vs.
Ellen Albertina Polyblank, otherwise known as Sister Albertina, Trustee for Stella Keomailani Cockett, and Stella K. Cockett, sole beneficiary under said Trust.

Appeal from the Supreme Court of the Territory of Hawaii.

[April 8, 1907.]

Mr. Justice Holmes delivered the opinion of the Court.

This is an appeal from a decree affirming a decree of foreclosure and sale under a mortgage executed by the appellants to the appellee, Sister Albertina. Haw. . The defendants (appellants) pleaded to the jurisdiction that after the execution of the mortgage a part of the mortgaged land had been conveyed by them to one Damon, and by Damon to the Territory of Hawaii, and was now part of a public street. The bill originally made the Territory a party, but the Territory demurred and the plaintiffs dismissed their bill as to it before the above plea was argued. Then the plea was overruled, and after answer and hearing the decree of foreclosure was made, the appellants having saved their rights. The decree excepted from the sale the land conveyed to the Territory and directed a judgment for the sum remaining due in case the proceeds of the sale were insufficient to pay the debt. Eq. Rule, 92.

The appellants contend that the owners of the equity of redemption in all parts of the mortgage land must be joined, and that no deficiency judgment should be entered until all the mortgaged premises have been sold. In aid of their contention they argue that the Territory of Hawaii is liable to suit like a municipal corporation, irrespective of the permission given by its statutes, which does not extend to this case. They liken the Territory to the District of Columbia, *Metropolitan R. R. Co.* v. *District of Columbia*, 132 U. S. 1, and point out that it has been a party to suits that have been before this Court. *Dawson* v. *Hawaii*, 194 U. S. 154. *Carter* v. *Hawaii*, 200 U. S. 255.

The Territory, of course, could waive its exemption, *Smith* v. *Reeves*, 178 U. S. 436, and it took no objection to the proceedings in the cases

cited if it could have done so. See Act of April 30, 1900, c. 339, § 96. 31 Stat. 141, 160. But in the case at bar it did object, and the question raised is whether the plaintiffs were bound to yield. Some doubts have been expressed as to the source of the immunity of a sovereign power from suit without its own permission, but the answer has been public property since before the days of Hobbes. (Leviathan, c. 26, 2.) A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends. "*Car on peut bien recevoir loy d'autruy, mais il est impossible par nature de se donner loy.*" Bodin, Republique, 1, c. 8. Ed. 1629, p. 132. Sir John Eliot, De Jure Maiestatis, c. 3.

As the ground is thus logical and practical, the doctrine is not confined to powers that are sovereign in the full sense of juridical theory, but naturally is extended to those that in actual administration originate and change at their will the law of contract and property, from which persons within the jurisdiction derive their rights. A suit presupposes that the defendants are subject to the law invoked. Of course it cannot be maintained unless they are so. But that is not the case with a territory of the United States, because the territory itself is the fountain from which rights ordinarily flow. It is true that Congress might intervene, just as in the case of a State the Constitution does, and the power that can alter the Constitution might. But the rights that exist are not created by Congress or the Constitution, except to the extent of certain limitations of power. The District of Columbia is different, because there the body of private rights is created and controlled by Congress and not by a legislature of the District. But for the Territory of Hawaii it is enough to refer to the organic act. Act of April 30, 1900, c. 339, §§ 6, 55. 31 Stat. 141, 142, 150. *Coffield* v. *Hawaii*, 13 Haw. 478. See further *Territory of Wisconsin* v. *Doty*, 1 Pinney, 396, 405. *Langford* v. *King*, 1 Mont. 33. *Fisk* v. *Cuthbert*, 2 Mont. 593, 598.

However it might be in a different case, when the inability to join all parties and to sell all the land is due to a conveyance by the mortgagor directly or indirectly to the Territory the Court is not thereby deprived of ability to proceed.

Decree affirmed.

Mr. Justice HARLAN concurs in the result.

True copy.

Test:

Clerk Supreme Court, U. S.

Nemo suo statuto ligatur necessitative
Baldus. De Leg. et Const. Digna Vox, N.
Ed. 1496, fol. 51b. Ed. 1539, fol. 61.